TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 387.

CHARLES F. W. NEELY, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 16, 1900.

(17,872.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 30, 1900.

1 To the circuit court of the United States in and for the southern district of New York, in the second judicial circuit:

The petition of Charles F. W. Neely, by John D. Lindsay, his attorney and counsel, respectfully shows:

I. That your petitioner is a native-born citizen of the United States, an inhabitant and citizen of the State of Indiana, and a resident of the city of Muncie, in the said last-mentioned State.

II. That your petitioner is not enlisted or commissioned in the military service of the United States and is not subject to the articles of war or the rules or regulations of the United States Army, but is a civilian and in no manner, directly or indirectly, amenable to the disciplinary or other power or jurisdiction of the military branch of the United States Government.

III. That your petitioner is now actually imprisoned and restrained of his liberty and detained, by color of the authority of the United States, in the custody of William Henkel, Esquire, the United States marshal in and for the southern district of New York, to wit, at the borough of Manhattan of the city of New York, in the said district, under the following circumstances:

1. On or about the 28th day of June, 1900, at the borough of
2 Manhattan of the city of New York, in the southern district of New York, Ernest E. Baldwin, Esquire, then and yet being assistant United States attorney in and for the district aforesaid, appeared before the Honorable E. Henry Lacombe, circuit judge of the United States in and for the second circuit, and laid before the said circuit judge two certain complaints in writing and upon oath, copies of which are hereto annexed, marked "A" and "B" respectively.

2. Thereupon, to wit, on the same said last-mentioned day, the said circuit judge issued two certain warrants for your petitioner's arrest, copies of which are hereto annexed, marked "C" and "D" respectively.

3. Thereafter and on the 29th day of June, 1900, your petitioner was arrested and taken into custody and brought before the said circuit judge, at the United States courts and post-office building, in said borough, by the said United States marshal under color and by pretence of the authority of the said warrants.

4. Thereupon, to wit, on the said 29th day of June, 1900, at the borough aforesaid, your petitioner being represented before the said circuit judge by counsel, Henry L. Burnett, Esquire, United States attorney for the district aforesaid; the said Ernest E. Baldwin, Esquire, assistant United States attorney, as aforesaid, and Edward K. Jones, Esquire, special attorney general of the United States, appeared before the said circuit judge and made an application to the said circuit judge for your petitioner's extradition to Cuba under the said complaints; whereupon counsel for your petitioner moved for a dismissal of the said complaints upon
3 various grounds, and among others:

First. That the act of Congress hereinafter referred to, being

the act upon which the said proceedings were based, was unconstitutional and void and conferred no jurisdiction upon the said circuit judge; that there was no power in Congress, under the Constitution of the United States, authorizing the enactment of the said measure, and that the same was not a necessary or appropriate instrumentality for carrying into effect or executing any of the known powers of Congress; that the said act, if applicable to the defendant and to the situation set forth in the said complaints, would enable an American citizen to be subjected to the jurisdiction of a military government maintained by the President of the United States in friendly foreign territory in time of absolute peace, no authority for which military government exists or can exist under the Constitution of the United States, and that the said act sought to aid the military branch of the United States Government in the maintenance and execution of an illegal and unwarranted usurpation of the sovereignty of the Cuban people.

Second. That neither of the said complaints charged your petitioner with having committed an offense against any law in force in foreign territory lawfully occupied by or under the control of the United States.

5. The said motion was denied; whereupon the United States attorney offered in evidence in support of the said complaints
4 certain depositions taken in Cuba, as evidence tending to establish probable cause that your petitioner was guilty of the supposed offenses set forth in the said complaints.

6. The proceedings were thereupon adjourned to the 23rd day of July, 1900, when certain oral evidence was introduced by the Government. Further evidence for the Government, and also on the part of the defendant, was introduced on the 24th day of July, and the case was on that day submitted to the circuit judge for his decision.

7. That the circuit judge, having deemed the evidence adduced before him sufficient to establish probable cause that your petitioner was guilty of the matters set forth in the said complaints, thereafter, to wit, on the 8th day of August, 1900, handed down an opinion, a copy of which is hereto annexed, marked "E," and that your petitioner is now actually imprisoned and restrained of his liberty by the said William Henkel, Esquire, United States marshal, as aforesaid, in the said proceeding, claiming to so restrain your petitioner by color of the pretended authority of the said warrants of arrest.

IV. That the proceedings above described were instituted, prosecuted, and maintained, and your petitioner's present imprisonment, restraint, and retention under the said warrants are solely under color and pretense of the authority assumed to have been conferred in the premises by a certain act of Congress of June 6th, 1900, entitled "An act amending section 5270 of the Revised Statutes of the United States," a copy of which is hereto annexed, marked "F."

V. That at the time of the alleged commission of the offence charged in the said complaint, and at all times prior to the passage of the said act of Congress, there was no authority under the Constitution

and laws of the United States for the extradition by the
5 United States of persons charged with offences committed in a foreign territory or at any place without the territorial jurisdiction of the United States, except in pursuance of treaty stipulations duly entered into for that purpose.

VI. That, as your petitionor is advised by counsel and verily believes, the said act of Congress of June 6th, 1900, is in all respects, and especially in so far as it undertakes to afford a means of surrendering to the authorities now in control of the island of Cuba, for trial under the laws there in force, persons who shall violate or who have violated the criminal laws in force there by the commission of the offenses therein enumerated, or any offense violative of the Constitution of the United States, and utterly void and ineffective and conferred no authority upon the circuit judge to entertain the extradition proceedings which resulted in your petitioner's arrest and commitment, as aforesaid, and that your petitioner's arrest and detention in the said proceedings thereunder are without any authority of law whatsoever and in violation of his rights, privileges, and immunities under the Constitution and laws of the United States for the following reasons:

6 1. That the people of the island of Cuba are and at all times since the month of April, 1898, have been free and independant, and that the said island is a foreign country, regarding whose government or affairs Congress cannot competently legislate and in whose internal affairs the United States cannot lawfully interfere.

2. That by the joint resolution of Congress adopted April 19th, 1898, and approved by the President the following day, the political branch of the Government of the United States found and determined as matter of fact that the Cubans had a government of their own, capable of performing the duties and discharging the functions of an independant nation and having all the forms and attributes of nationality, entitling it to its place in the great family of nations, and that said finding and determination of fact *is* absolutely binding and conclusive upon the judicial branch of the Government.

3. That the status of Cuba and of the people of Cuba as a free and independent nation has at all times since the adoption and approval of the said joint resolution remained and yet does remain unchanged.

4. That at the time of the adoption and approval of the said resolution a state of war existed between the people of the island of Cuba and the government of the Kingdom of Spain; various portions of the territory of the Cuban people were invaded by the Spanish forces, and certain parts thereof were occupied and
7 controlled by such invading forces, and that by the adoption and approval of said joint resolution and upon the adoption and approval of the same the United States became the friendly ally of the Cuban people in its said war with Spain, and throughout the ensuing hostilities and until the termination of the said war the allied forces of the Cuban people and of the United States jointly waged war against the government of the Kingdom of Spain.

5. That the said war had been wholly terminated and was at an

end on or about the 1st day of January, 1899, at which time all the invading Spanish forces had evacuated the island of Cuba.

6. That at no time since the 1st day of January, 1899, has there existed a state of war between the Government of the United States and the Kingdom of Spain; that there has never existed a state of war between the United States and the Cuban people, but, on the contrary, the United States and the Cuban people have at all times during the existence of the latter as an independent nation been on terms of perfect peace and amity.

7. That during the latter part of the said war and until peace was established a part of the Army of the United States, consisting of several thousand officers and soldiers, was stationed in Cuba, and, in co-operation with the army of the Cuban people, conducted in the said island various military operations in the prosecution of the war and for its successful conclusion.

8 8. That on the 13th day of December, 1898, the Secretary of War of the United States made and issued an order wherein and whereby, by direction of the President, a division to be known as the division of Cuba, consisting of the geographical department and provinces of the said island of Cuba, with headquarters in the city of Havana, was created under command of a major general of the United States Army, who, in addition to command of the United States troops in the said division, was by the said order directed to exercise the authority of military governor of the said island.

9. That when the said war was at an end and the island of Cuba pacified and actual peace existed there, the said military forces of the United States being still stationed in Cuba, the President of the United States, as the Commander-in-chief of the Army of the United States, instead of withdrawing the army from the said island and leaving the government and control thereof to the Cuban people, kept and continued the army and yet does keep and continue it there.

10. That thereupon the President, as such commander-in-chief, set up and established in the said island a military form of government, to wit, a government thereof by martial rule, and at all times since the said 1st day of January has there maintained and yet does maintain such military government of the island of Cuba and over the affairs of the Cuban people, thereby usurping and entirely suspending the government and control of the island by its people and substituting in its place martial rule.

9 11. That at all times since the said 1st day of January, 1899, the President of the United States has maintained such martial rule in Cuba and throughout the territory of that island through a military governor appointed by him and by force of the army under his command.

12. That the said military governor assumes to exercise and has ever since the said 1st day of January, 1899, actually exercised absolute executive, legislative, and judicial power over the affairs of the island of Cuba and over the Cuban people and rules the same by his sole and uncontrolled will, subject to no superior authority save that

of the President of the United States as Commander-in-chief of the United States Army.

13. That in the exercise of such martial rule the military governor has taken into his hands and has subjected and now subjects to his absolute authority all the departments of government in that island. He assumes and actually exercises absolute power and authority, not only over the persons and property of the citizens of Cuba, but over the persons and property of all persons in the island there resident or who were sojourners and whether citizens of Cuba or of the United States or of any other nation, to the same extent as though Cuba were a hostile foreign territory in the military occupation of the United States in time of war and the United States were an invader or conqueror of territory belonging to an
10 enemy nation. He assumes to enact, modify, amend, or repeal laws, establish, reorganize, or abolish courts, civil and criminal; adopt or change rules of judicial procedure, and in general to deal with the administration of justice in the island as he sees fit.

14. That on the said 1st day of January the said military governor published a proclamation addressed "To the people of Cuba," wherein and whereby he declared (among other things) that the civil and criminal code which prevailed in Cuba prior to the relinquishment of Spanish sovereignty would remain in force, with such modifications and changes as might from time to time be found necessary in the interest of good government.

15. That on the 11th day of January, 1899, he issued a military edict or order, whereby he ordered that thereafter the civil government of Cuba should be administered by four departments, to be known as the department of state and government, the department of finance, the department of justice and public instruction, and the department of agriculture, commerce, industries, and public works, each under the charge of a secretary, and on the following day he caused to be published an announcement of the appointment by him of secretaries of such departments.

11 16. That on the 14th day of April, 1899, he caused to be published a military order creating a supreme court, with jurisdiction throughout Cuban territory, composed of a president or chief justice, six associate justices, one fiscal, two assistant fiscals, one secretary or chief clerk, two deputy clerks, and other subordinate employees, with administrative functions as well as those of a court of justice in civil and criminal matters.

17. That by article XXXVII of the same order he declared that to be eligible for appointment to the office of president, justice, fiscal, assistant fiscal, or deputy clerk of the supreme court the person must (among other things) be a Cuban or declare on oath that he accepts Cuban citizenship, provided he be a person included within the provisions of article 9 of the "treaty of Paris of December 10th, 1898."

18. That on the 15th day of June, 1899, he issued a military edict or order whereby he declared that thereafter the "audiencias" of the island of Cuba should be organized and should exercise jurisdiction

in accordance with the provisions of the said last-mentioned edict or order.

19. That by article XLI of the same order he declared article XXXVII (before mentioned) of the order creating the supreme court applicable to the functionaries of the "audiencia."

20. That the supreme court, the "audiencias," and certain tribunals called "courts of first instance" are at present the only
12 courts in Cuba exercising or assuming criminal jurisdiction; that all of said courts are at present organized, controlled, and operated by the military governor, who assumes power to appoint, suspend, and remove their members, officers, and employees at his pleasure.

21. That said courts act as the mere agent and instruments of the military governor and are wholly dependent for their existence and continuance upon his will.

22. That under the military system now in force there is no means of trying offenders against the laws in force in Cuba (if any there be) except through the instrumentality of said courts or such other courts as the military governor may see fit to erect.

23. That there is no authority in the Constitution of the United States for the occupation or control by the United States of the territory of a friendly foreign nation or for the government of such foreign territory by the United States by martial law or otherwise in time of peace, and that the form of government now maintained by the United States in Cuba is wholly illegal and without authority under the Constitution of the United States.

24. That there is no authority in the Constitution of the United States for the exercise by the United States military authorities through the President, as commander-in-chief or otherwise, of jurisdiction over United States citizens who are civilians and not commissioned or enlisted in the military service, even in time of
13 war, except in hostile territory in the forcible military occupation of the United States forces, and that in time of peace neither martial law nor military jurisdiction of any kind can lawfully be employed or exercised as against civilian citizens even in the United States, much less in friendly foreign territory.

25. That the said act of Congress of June 6th, 1900, is therefore unconstitutional and void, in that—

(*a.*) There is no authority in the Constitution for its enactment by Congress, the legislative power granted to Congress by the Constitution not extending to the enactment of any such measure.

(*b.*) It seeks to aid the President of the United States and the military governor appointed by him in the maintenance in foreign territory, in time of peace, of an unlawful and unauthorized military jurisdiction.

(*c.*) It seeks to give legal countenance and support to an unwarranted and unjustifiable invasion by the United States military forces of the territory of a friendly foreign power and the wrongful usurpation of the functions of sovereignty belonging to such foreign nation.

(*d*.) It seeks to subject American citizens who are civilians and not in the military service to martial rule in time of peace.

XI. That the said act of Congress conferred no jurisdiction upon the circuit judge to entertain the extradition proceedings
14 herein or to issue the warrants aforesaid; that the said warrants were issued without legal right, authority, or jurisdiction of any kind and are utterly void and ineffectual, and that your petitioner's arrest, detention, and imprisonment thereunder are in violation of the Constitution of the United States and in violation of his rights, privileges, and immunities thereunder.

XII. That prior to the institution of the extradition proceedings aforesaid your petitioner was arrested and taken into custody under an order of arrest issued by the said the Honorable E. Henry Lacombe in a civil action brought by the United States for the recovery of certain moneys alleged to have been wrongfully converted by the petitioner, and that the petitioner is now detained and in the custody of the said marshal under and by virtue of the said order of arrest as well as under color of the authority of the warrants aforesaid in the said extradition proceeding.

Wherefore your petitioner prays that a writ of *habeas corpus* may issue, directed to the said William Henkel, marshal, or to any of his deputies, requiring him or them to bring and have your petitioner before this court at a time to be by it determined, together with the true cause of his detention, to the end that an inquiry may be had into the cause of the restraint of your petitioner in the said extradition proceedings, and that this court may
15 proceed in a summary way to determine the facts of the case in that regard, and the question of the constitutionality of the act under which the said warrants were issued, and the legality of the imprisonment, restraint, and detention thereunder, now imposed upon him, and thereupon to dispose of your petitioner as law and justice require.

And your petitioner will ever pray.

Dated the 9th day of August, 1900.

CHARLES F. W. NEELY, *Petitioner*,
By JNO. D. LINDSAY,
One of His Attorneys and of Counsel.

NICOLL, ANABLE & LINDSAY,
Attorneys for Petitioner, 31 *Nassau Street, New York City.*

CITY AND COUNTY OF NEW YORK, }
Southern District of New York, } ss.:

John D. Lindsay, being duly sworn, says that he is the attorney for the petitioner named in the foregoing petition; that he has read the said petition, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true, and that he makes this application at the request of the petitioner, who is unable to appear and make the same in person.

JNO. D. LINDSAY.

16 Sworn to before me this 9th day of August, 1900.
WM. J. WALLACE,
U. S. Circuit Judge.

17 EXHIBIT "A."

Before Honorable E. Henry Lacombe, judge of the circuit court, southern district of New York.

In the Matter of the Application for the Extradition of CHARLES F. W. NEELY, Finance Officer of the Department of Posts, Cuba, Charged with Embezzlement and Malversation in Office under Article 401 of the Laws of Cuba, Pursuant to an Act of Congress Amendatory of Sec. 5270, R. S., Approved June 6, 1900.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

Ernest W. Baldwin, assistant United States attorney in and for said district, being duly sworn, deposes and says upon information and belief:

First. That one Charles F. W. Neely, being then and there a public employee, to wit, finance agent of the department of posts in the city of Havana, island of Cuba, on the 6th day of May, in the year of our Lord nineteen hundred, or about that time, having then and there charge of the collection and deposit of moneys of the department of posts of the city of Havana aforesaid, did unlawfully and feloniously take and embezzle from the public funds of the
18 said island of Cuba the sum of ten thousand dollars and more, being moneys and funds which then and there had come into his charge and under his control in his capacity as such public employee and finance agent, as aforesaid, and by reason of his said office and employment, thereby violating chpater X, article 401, of the penal code which was then and there and which is now in force in the said island of Cuba.

Second. That the said Charles F. W. Neely is a fugitive from justice from the said island of Cuba and is now within the territory of the United States of America, to wit, in the city of New York, in the southern district of New York.

Third. That the crime of which the said Charles F. W. Neely has so as aforesaid been guilty is an offense within the meaning of an act of Congress entitled "An act amending section fifty-two hundred and seventy of the Revised Statutes of the United States," approved June 6th, 1900, to wit, that part of said act of Congress relating to the "embezzlement or criminal malversation of the public funds committed by public officers, employees, or depositaries."

Fourth. That the said island of Cuba is a foreign country occupied by and under the control of the United States.

Fifth. That the said Charles F. W. Neely, as deponent is informed and believes, was indicted for the crime of embezzlement of public funds in the said city of Havana on the said 6th day of May,

1900, an order being then and there regularly and duly en-
19 tered to that effect by the judge of the court of the first instance and instruction of the cathedral district of the said city of Havana; that the judge of the said court thereupon decreed that the said Charles F. W. Neely should be arrested and that proper request should be made for his extradition. Whereupon Leonard Wood, major general United States volunteers, military governor of Cuba, under his hand and seal of the military government of the said island of Cuba, on the 13th day of June, 1900, issued his requisition for such extradition to his Excellency the President of the United States.

Sixth. That deponent's information and belief are based upon the said requisition and the proofs and papers attached to and accompanying the same.

ERNEST E. BALDWIN.

Subscribed and sworn to before me this 28th day of June, A. D. 1900.

E. HENRY LACOMBE,
Circuit Judge.

20 EXHIBIT "B."

Before Honorable E. Henry Lacombe, judge of the circuit court, southern district of New York.

In the Matter of the Application for the Extradition of CHARLES F. W. NEELY, Employed in a Branch of the Department of Posts, Cuba, Charged with Embezzlement and Conversion of Postage Stamps, Moneys, etc., under Sections 37 & 55 of the Postal Code for the Island of Cuba.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Ernest E. Baldwin, assistant United States attorney in and for said district, being duly sworn, deposes and says upon information and belief:

First. That one Charles F. W. Neely, at the times hereinafter mentioned, being then and there employed in and connected with the business and operations of a branch of the service of the department of posts, to wit, in the city of Havana, island of Cuba, did unlawfully and fraudulently, between the dates of July 1st, 1899, and May 1st, 1900, embezzle and convert to his own use postage stamps, money, funds, and property belonging to or in the custody of the department of posts of Cuba, which had come into his posses-
21 sion and under his control in the execution of his said employment and service and under color and claim of authority as such employee—that is to say, to the amount and value of more than fifty-seven thousand dollars in gold of the United States currency, in violations of section 37 and 55 of the postal code of the said island of Cuba.

Second. That the said Charles F. W. Neely is a fugitive from justice from the said island of Cuba and is now within the territory of the United States of America, to wit, in the city of New York, in the southern district of New York.

Third. That the crime of which the said Charles F. W. Neely has so, as aforesaid, been guilty is an offense within the meaning of an act of Congress entitled "An act amending section fifty-two hundred and seventy of the Revised Statutes of the United States," approved June 6th, 1900, to wit, that part of said act of Congress relating to the "embezzlement or criminal malversation of public funds committed by public employees."

Fourth. That the said island of Cuba is a foreign country occupied by and under the control of the United States.

Fifth. That the said Charles F. W. Neely, as deponent is informed and believes, was indicted for the crime of malversation of public funds confided to him by reason of his employment, as aforesaid, and was so declared to be indicted on the 18th day of May, A. D. 1900, in the said city of Havana, an order being then and there regularly and duly entered to that effect by the judge of the
22 court of first instance and instruction of the district of the cathedral of said city of Havana, said indictment being based upon the declarations under oath of George L. Seybolt, acting chief special agent of the department of posts aforesaid, and of Harry H. Williams, special agent thereof, and a proper request has been made for the extradition of said Charles F. W. Neely, bearing date the said 18th day of May, 1900, in order that the said Charles F. W. Neely may be brought to trial before the proper courts of said island for the crime of which he stands accused, the said request for extradition being signed by Leonard Wood, military governor of Cuba, under his hand and the seal of the military government of the said island of Cuba, and being addressed to his excellency the Honorable William McKinley, President and Chief Magistrate of the United States of America.

Sixth. That deponent's information and belief are based upon the said requisition and the proofs and papers attached to and accompanying the same.

ERNEST E. BALDWIN.

Subscribed and sworn to before me this 28th day of June, A. D. 1900.

E. HENRY LACOMBE,
Circuit Judge.

23 EXHIBIT "C."

Warrant of Arrest.

The President of the United States of America to the marshal of the United States for the southern district of New York, his deputies or either of them:

Whereas complaint has been made on oath under the provisions of the act of Congress approved June 6th, 1900, entitled "An act

amending section fifty-two hundred and seventy of the Revised Statutes of the United States," before me, E. Henry Lacombe, a judge of the circuit court of the United States in and for said district, duly authorized by law, that one Charles F. W. Neely, being then and there a public employee, to wit, finance agent of the department of posts in the city of Havana, island of Cuba, on the 6th day of May, in the year of our Lord one thousand nine hundred, or about that time, having then and there charge of the collection and deposit of moneys of the department of posts of the said city of Havana, did unlawfully and feloniously take and embezzle from the public funds of the said island of Cuba the sum of ten thousand dollars and more, being then and there moneys and funds which had come into his charge and under his control in his capacity as such public employee and finance agent, as aforesaid, and by reason of his said office and employment, thereby violating chapter 10, article 401, of the penal code of the said island of Cuba—that is to say, a crime within the meaning of the said act of Congress approved
24 June 6th, 1900, as aforesaid, relating to the "embezzlement or criminal malversation of the public funds committed by public officers, employees, or depositaries"—as will more fully appear by a reference to the said complaint:

Now, therefore, we command you forthwith to take him, the said Charles F. W. Neely, and bring him before me, the said judge, in order that the evidence of probable cause as to the guilt of the said Charles F. W. Neely of the offense charged against him may be heard and considered, and, if deemed sufficient, that the same may be certified, with a copy of all the proceedings, to the Secretary of State, that an order may issue for the return and surrender of the said Charles F. W. Neely pursuant to the authority of the said act of Congress.

Witness my hand and the seal of the said circuit court this 28th day of June, 1900.

E. HENRY LACOMBE,
Circuit Judge.

25 EXHIBIT "D."

Warrant of Arrest.

The President of the United States of America to the marshal of the United States for the southern district of New York, his deputies or either of them:

Whereas complaint has been made on oath under the provisions of the act of Congress approved June 6th, 1900, entitled "An act amending section fifty-two hundred and seventy of the Revised Statutes of the United States," before me, E. Henry Lacombe, a judge of the circuit court of the United States in and for said district, duly authorized by said act of Congress, that one Charles F. W. Neely, being then and there employed in and connected with the business and operations of a branch of the service of the department of posts, to wit, in the city of Havana, island of Cuba, between the dates of

July 1, 1899, and May 1, 1900, while so employed, did unlawfully and fraudulently embezzle and convert to his own use postage stamps, moneys, funds, and property belonging to or in the custody of the department of posts of Cuba, which had come into his possession and under his control in the execution of his said employment and service and under color and claim of his authority as such employee—that is to say, to the amount and value of more than fifty-seven thousand dollars in gold of the United States currency—in violation of sections 37 and 55 of the postal code
26 of the said island of Cuba—that is to say, a crime within the meaning of the said act of Congress approved June 6th, 1900, as aforesaid, relating to the "embezzlement or criminal malversation of the public funds committed by public employees"—as will more fully and at large appear by reference to the said complaint:

Now, therefore, we command you forthwith to take him, the said Charles F. W. Neely, and bring him before me, the said judge, in order that the evidence of probable cause as to the guilt of the said Charles F. W. Neely of the offense charged against him may be heard and considered, and, if deemed sufficient, that the same may be certified, with a copy of all the proceedings, to the Secretary of State, that an order may issue for the return and surrender of said Charles F. W. Neely pursuant to the authority of the said act of Congress.

Witness my hand and the seal of the said circuit court this 28th day of June, 1900.

E. HENRY LACOMBE,
Circuit Judge.

27 "EXHIBIT E."

United States Circuit Court, Southern District of New York.

In the Matter of the Application for Extradition of CHARLES F. W. NEELY to Cuba.

LACOMBE, *Circuit Judge:*

The various preliminary objections have been disposed of in the former opinion. Upon the hearing, counsel for the prisoner offered to prove by witnesses that a fair and impartial trial cannot be secured to the prisoner in the island of Cuba. Reliance is placed upon the report of the Judiciary Committee of the Senate recommending the passage of the act of June 6th, 1900, the concluding paragraph of which reads as follows:

"In order that there may be no vexatious exercise of the power of extradition under this act, it is provided that there shall be shown probable cause before a judge of the appropriate court, who shall order the returns and surrender, but no such order shall be made until the judge shall be satisfied that the accused will have a speedy and fair trial."

If the statute had passed in the language recommended by the

Judiciary Committee there would be force in this argument,
28 but the history of the enactment is conclusive against the conducting of any such investigation by this court. When the bill came from the House of Representatives the concluding sentences read as follows:

"Provided further, that such proceedings shall be had before a judge or a justice of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged. If so held, such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authority shall guarantee to such person a fair and impartial trial."

The Judiciary Committee of the Senate reported in favor of "striking out all after the enacting clause" and substituting an enactment which should contain, *inter alia*, the following:

"Provided further, that before making such order of surrender and return the judge shall be satisfied that proper provision exists for securing to the accused a speedy and fair trial for such offense, where he will be informed of the nature and cause of the accusation, and be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defense."

Congress, however, rejected this amendment proposed by the Judiciary Committee and passed the act in substantially the language above quoted from the House bill. Manifestly, therefore, this court should not enter upon the investigation proposed. Its sole
29 function is to determine whether there is probable cause that the prisoner is guilty of the offense charged, such offense being one of those enumerated in the act.

It will not be necessary to discuss the testimony covering the entire period of the prisoner's incumbency. Touching the six weeks from January 1st, 1900, to February 10th, 1900, the evidence is more compact and specific than it is for the other months.

It appears that Neely was the head of the bureau of finance in the department of posts of the island of Cuba. That bureau issued "stamped paper" (*i. e.*, stamps, postal cards, stamped envelopes, etc.) to the bonded postmasters of the island, upon their requisition, and received the remittances made by them to pay for the same. Such remittances came by registered mail, usually in the shape of drafts, warrants, cash, or money orders. The unbonded postmasters received stamps and paid cash. To the bonded postmasters there were sent receipts for their remittances, such receipts being torn out of a book containing stubs. Entries of such remittances were also made in a book called "Small Cash Book, Exhibit A." In this cash book were also entered the items of cash payments by unbonded postmasters. Deposits of these funds were made every ten days in the North American Trust Company, the payments accumulating meanwhile in the safe. When a deposit was made a deposit slip in the usual form was made out and turned in with the funds. Now, for the period from January 1st, 1900, to

February 10, 1900, we have the small cash book, Exhibit A,
30 showing receipts of money from postmasters. George W. Marshall, who has been employed in the bureau continuously since February, 1899, testified under oath before the court that every entry in the book for that period is in his own handwriting; that he knew of the transaction at the time, having himself prepared the receipt for the postmaster, which Neely signed, and that his entry was accurately made. It is, of course, possible that through error or oversight or otherwise other money may have been received and not entered, but that such amounts as are entered were received is sworn to positively by a witness having personal knowledge of the facts and is wholly uncontradicted. These items aggregate $38,967.29. The teller or clerk in charge at the North American Trust Company testified to the deposits made during the same period, and that none others than those he swore to were made during that period. He produced the original deposit slips. The witness Marshall, being shown these slips, went on the stand, identified them and swore that, except from a memorandum in Neely's handwriting on the slip of January 6th, 1900, they were entirely in his own handwriting and accurately represented the deposits made by him on the date given. They are as follows:

Jan. 6, 1900	4,000
" 10, 1900	3,000
" 20, 1900	5,700
" 30, 1900	4,830
Feb. 10, 1900	4,907.57
Total	$24,437.57

31 The difference between receipts and deposits is $14,529.72. Some slight discrepancy by difference of time between receipt and deposit on the same day is, of course, to be expected, but the evidence of Marshall, direct and positive, not contradicted or impeached or qualified or shaken on cross-examination, should satisfy any jury beyond reasonable doubt that $14,000, or thereabouts, of funds received from the sale of stamped paper was lost, stolen, or embezzled after it reached the bureau.

It further appears that Neely was in charge of the bureau and directed its business methods; that he himself opened the mail containing the money and either wrote the receipts himself or signed those which Marshall prepared and which were sent to postmasters; that he had constant access to the books and examined them; that he frequently—almost daily—looked over the accumulating funds in the safe, doing them up in bundles for convenience of counting and deposit; that he himself directed what should be the amount of each deposit after Marshall had reported how much loose silver there was in the drawer, and himself handed to Marshall sufficient currency or drafts to make up, with such loose silver, the amount he thus directed to be deposited; that, except for himself and Marshall (who had testified here to the correctness of his own transactions), there were changes in the personnel of the bureau,

but that, as its records show, there was a uniform deficiency of deposits as compared with receipts from the beginning of Neely's administration until he left the island on leave, April 28th,
32 1900. It is, of course, possible that, while he was himself opening the mail, receiving the money, signing the receipts, handling the funds, counting them, moving them from drawer to drawer of the safe, and making them up for deposit, others, in the bureau or out of it, could have made away during six weeks with $14,000—over 35 % of the total receipts—under his eyes and almost out of his hands, without his knowledge or consent, but it is highly improbable.

In the opinion of this court, the Government has abundantly shown that there is probable cause to believe that Neely is guilty of the offense of "embezzlement or criminal malversation of the public funds," he being at that time a "public officer" or "employee" or "depositary." Such an offense is obnoxious to the penal code in force in Cuba, article 401 of which provides that "the public employee who, by reason of his office, has in his charge public funds or property and who should take (or consent that others should take) any part therefrom, shall be punished, etc." There is no merit in the contention that this article applies only to persons in the public employ of Spain. Spain having withdrawn from the island, its successor has become the "public" to which the code, remaining unrepealed, now refers. The suggestion that under this penal code no public employee could be prosecuted or punished until his superior had heard the case and turned the off nder over to the criminal law for trial is matter of defense and need not be considered here. The evidence shows probable cause to
33 believe that the prisoner is guilty of an offense defined in the act of June 6th, 1900, and which is also a violation of the criminal laws in force in Cuba, and upon such evidence he will be held for extradition.

Two obstacles to his extradition now exist. He has been held to bail in this court upon a criminal charge of bringing into this district government funds embezzled in another district. He has also been arrested in a civil action brought in this court to recover $45,000, which, it is alleged, he has converted. When both of these proceedings shall have been discontinued the order in extradition will be signed. This may be done on August 13th, at 11 a. m.

34 EXHIBIT F.

An act amending section fifty-two hundred and seventy of the Revised Statutes of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section fifty-two hundred and seventy of the Revised Statutes of the United States is hereby amended by adding thereto the following proviso:

"Provided, that whenever any foreign country or territory, or any part thereof is occupied by or under the control of the United

States, any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of any of the following offences, namely: Murder and assault with intent to commit murder; counterfeiting or altering money; counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same; forgery or altering, and uttering what is forged or altered; embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries; larceny or embezzlement of an amount not less than one hundred dollars in value, burglary, defined to be the breaking and entering by night-time into the house of another person with intent to commit a felony therein, and the act of breaking and entering the house or
35 building of another, whether in the day or night time, with the intent to commit a felony therein; the act of entering or of breaking and entering the offices of the Government and public authorities, or the officers of banks, banking-houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein; perjury or the subornation of perjury; rape; arson; piracy by the law of nations; murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government; malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life, and who shall depart or flee, or who has departed or fled, from justice therein to the United States, or to any Territory thereof, or to the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern
36 proceedings authorized by this proviso: Provided further, that such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged.

And provided further that no return or surrender shall be made of any person charged with the commission of an offense of a political nature.

If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such person a fair and impartial trial."

37 (Orig. endorsed:) Circuit court of the United States, southern district of N. Y. In the matter of the application of Charles F. W. Neely for a writ of *habeas corpus*, &c. Petition for writ. Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, New York. Due service of the within petition is hereby admitted this 10th day of August, 1900. Henry L. Burnett, U. S. att'y, attorney for U. S. Wm. Henkel, U. S. marshal, S. D. N. Y. U. S. circuit court. Filed Aug. 10, 1900. John A. Shields, clerk.

38 At a stated term of the circuit court of the United States of America in and for the southern district of New York, in the second circuit, held at the United States court and post-office building, in the borough of Manhattan of the city of New York, on the ninth day of August, in the year of our Lord one thousand nine hundred.

Present: Hon. William J. Wallace, circuit judge.

In the Matter of the Petition of CHARLES F. W. NEELY for a Writ of *Habeas Corpus*.

On reading and filing the petition of Charles F. W. Neely, verified the 9th day of August, 1900, for a writ of *habeas corpus*, directed to William Henkel, Esqr., United States marshal in and for the southern district of New York, requiring him to bring and have your petitioner before this court, together with the true cause of his detention of your petitioner, to the end that this court may act thereupon as of right and according to law ought to be done: now, after hearing John D. Lindsay, Esqr., of counsel for said petitioner, in support of said application, and due deliberation having been had, it is—

Ordered that such application be, and the same hereby is, in all things denied.

Enter.

WM. J. WALLACE,
Judge of the Circuit Court of the United States for the Southern District of New York.

39 (Orig. endorsed:) U. S. district court, southern district of New York. In the matter of the petition of Charles F. W. Neely for a writ of *habeas corpus*. Order denying application. Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, New York. Due service of a copy of the within order is hereby admitted this 10 day of August, 1900. Henry L. Burnett, U. S. att'y, attorney for U. S. Wm. Henkel, U. S. marshal, S. D. N. Y. U. S. circuit court. Filed Aug. 10, 1900. John A. Shields, clerk.

40 At a stated term of the circuit court of the United States in and for the southern district of New York, held at the United States courts and post-office building, in the borough of Manhattan of the city of New York, on the 9th day of August, 1900.

Present: Hon. William J. Wallace, circuit judge.

In the Matter of the Petition of CHARLES F. W. NEELY for a Writ of *Habeas Corpus*.

An appeal having been duly taken to the Supreme Court of the United States from an order entered herein the 9th day of August, 1900, denying the application of the petitioner for a writ of *habeas corpus*: now, on motion of Nicoll, Anable & Lindsay, attorney- and solicitors for the petitioner, it is—

Ordered that the said Charles F. W. Neely be remanded to the custody of a marshal of the United States for the southern district of New York, and be kept and detained in such custody pending and until the determination of the said appeal by the said Supreme Court of the United States and the further order of the court thereon.

Dated at the city of New York, the 9th day of August, 1900.

Enter.

WM. J. WALLACE,
Judge of the Circuit Court of the United States.

41 (Orig. endorsed:) Circuit court of the United States for the southern district of New York In the matter of the petition of Charles F. W. Neely for a writ of *habeas corpus*. Copy. Order remanding petitioner. Nicoll, Anable & Lindsay, attorneys for Chas. F. W. Neely, 31 Nassau street, New York. Due service of a copy of the within order is hereby admitted this 10th day of August, 1900. Henry L. Burnett, U. S. att'y, attorney for U. S. Wm. Henkel, U. S. marshall, S. D. N. Y. U. S. circuit court. Filed Aug. 10, 1900. John A. Shields, clerk.

42 Circuit Court of the United States for the Southern District of New York.

In the Matter of the Petition of CHARLES F. W. NEELY for a Writ of *Habeas Corpus*.

CHARLES F. W. NEELY, Appellant,
against
WILLIAM HENKEL, Appellee.

SIRS: Please take notice that Charles F. W. Neely, the petitioner above named, hereby appeals to the Supreme Court of the United States from the final order made and entered herein on the ninth day of August, 1900, denying his application for a writ of *habeas corpus*.

Dated New York, August 9th, 1900.

Yours, &c., NICOLL, ANABLE & LINDSAY,
Att'ys for Petitioner, 31 Nassau St., N. Y. City.

To Hon. Henry L. Burnett, United States district attorney for the southern district of New York; John A. Shields, Esquire, clerk of the circuit court of the United States in and for the southern district of New York; William Henkel, Esquire, United States marshal for the southern district of New York.

43 (Orig. endorsed:) Circuit court of the United States for the southern district of New York. In the matter of the petition of Charles F. W. Neely for a writ of *habeas corpus*. Copy. Notice of appeal. Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, New York. Due service of the within notice of appeal is hereby admitted this 10th day of August, 1900. Henry L. Burnett, U. S. att'y, attorney for U. S. Wm. Henkel, U. S. marshal, S. D. N. Y. U. S. circuit court. Filed Aug. 10, 1900. John A. Shields, clerk.

44 Circuit Court of the United States, Southern District of New York.

In the Matter of the Petition of CHARLES F. W. NEELY for a Writ of *Habeas Corpus*.

The petition of the above-named petitioner for an order allowing an appeal from the final order heretofore entered in this cause to the Supreme Court of the United States.

Charles F. W. Neely, the petitioner in the above-entitled cause, feeling himself aggrieved by the final order heretofore made and entered by this court in this cause on the ninth day of August, 1900, whereby it was ordered that his application for a writ of *habeas corpus*, directed to William Henkel, Esqr., United States marshal in and for the southern district of New York, requiring said marshal to bring and have your petitioner before this court, together with the true cause of his detention of your petitioner, be, and the same thereby was, denied, now comes, by Nicoll, Anable & Lindsay, Esqrs., his solicitors and counsel, and petitions this court for an order

45 allowing him, said petitioner, to prosecute an appeal from said final order to the Supreme Court of the United States under and according to the laws of the United States in that behalf made.

And your petitioner will ever pray.

CHARLES F. W. NEELY, *Petitioner*,
By JOHN D. LINDSAY, *His Attorney*.

NICOLL, ANABLE & LINDSAY,
Attorneys for Petitioner, 31 *Nassau Street, N. Y.*

COUNTY OF NEW YORK, } ss:
Southern District of New York, }

John D. Lindsay, being duly sworn, says he is the attorney for the petitioner above named; that the foregoing petition is true to his own knowledge except as to the matters therein stated to be alleged on information & belief, and that as to those matters he believes it to be true.

JNO. D. LINDSAY.

Sworn to before me this 9th day of August, 1900.

WM. J. WALLACE,
U. S. Circuit Judge.

The foregoing petition on appeal is granted and claim of appeal therein made is allowed. Undertaking fixed at $250.

Done in open court this 9th day of August, 1900.

WM. J. WALLACE,
Judge of the Circuit Court of the United States for the Southern District of New York.

46 (Orig. endorsed:) (Endorsed:) Circuit ct. of the U. S., southern dist. of New York. In the matter of the petition of Charles F. W. Neely for a writ of *habeas corpus*. Petition of appeal and allowance thereof. Nicoll, Anable & Lindsay, attorneys for Chas. F. W. Neely, 31 Nassau street, New York. Service of the within petition and order is hereby admitted this 10th day of August, 1890. Henry L. Burnett, U. S. att'y, attorney for U. S. Wm. Henkel, U. S. marshal, S. D. N. Y. U. S. circuit court. Filed Aug. 10, 1900. John A. Shields, clerk.

47 Supreme Court of the United States.

In the Matter of the Petition of CHARLES F. W. NEELY for a Writ of *Habeas Corpus*.

Know all men by these presents that we, Charles F. W. Neely, as principal, and The United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the United States of America in the full and just sum of two hundred and fifty dollars, to be paid to the said United States; to which payment, well and truly to be made, we bind ourselves, our heirs and executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of August, one thousand nine hundred.

Whereas lately, at a circuit court of the United States in and for the southern district of New York, in a proceeding therein pending, an order was entered denying the application of the above-named petitioner for a writ of *habeas corpus*;

And the said petitioner having obtained an appeal and filed a copy thereof in the clerk's office of the said court to review said order:

48 Now, the condition of the above obligation is such that if the said petitioner, Charles F. W. Neely, shall prosecute said appeal to effect and shall answer all costs if he shall fail to make the said appeal good, then the above obligation to be void; else to remain in full force and effect.

CHARLES F. W. NEELY. [SEAL.]

Sealed and delivered in presence of—
EDWARD N. EMERSON,
As to Charles F. W. Neely.

[SEAL.] THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN, *Manager*.

Attest: WYLLYS BENEDICT, *Attorney-in-fact*.
(Stamp.)

49 STATE OF NEW YORK, } ss.:
County of New York, }

On this 9th day of August, 1900, before me personally appeared Charles F. W. Neely, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

[SEAL.] EDWARD N. EMERSON,
Notary Public, N. Y. Co.

STATE OF NEW YORK, } ss.:
County of New York, }

On the 9th day of August, in the year 1900, before me personally came Sylvester J. O'Sullivan, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he was manager of the United States Fidelity and Guaranty Company, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order, and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3 of chapter 720 of the Session Laws of the State of New York for the Year 1893; and the said Sylvester J. O'Sullivan further said that he was acquainted with Wyllys Benedict and knew him to be the attorney-in-fact of said company; that the signature of said Wyllys Benedict subscribed to the within instrument is in the genuine handwriting of said Wyllys Benedict and was subscribed thereto by like order of the board of directors and in the presence of him, the said Sylvester J. O'Sullivan.

HOWARD McCLURE,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

At a regular meeting of the board of directors of the United States Fidelity and Guaranty Company, duly called and held on the second day of May, A. D. 1898, at the office of the company, city of Baltimore, State of Maryland, a quorum being present, on motion it was unanimously—

Resolved, That Andrew Freedman, vice-president, or Sylvester J. O'Sullivan, manager, or Harry C. Harden or Wyllys Benedict, attorneys-in-fact of this company in the State of New York, be, and they hereby are, and each one of them is, authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for or on behalf of the company in its business of guaranteeing the faithfulness of persons holding positions of trust and the performance of contracts other than insurance policies and executing or guaranteeing bonds or undertakings required or permitted in all actions or proceedings at law, such bonds and undertakings, however, to be attested in every instance by one other of the persons above named, as occasion may require.

STATE OF NEW YORK, } ss.:
County of New York, }

I, Wyllys Benedict, attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof as recorded in the minute book of the said company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 9th day of August, 1900.

[SEAL.] WYLLYS BENEDICT,
Attorney-in-fact.

Statement of the United States Fidelity and Guaranty Company at the Close of Business June 30, A. D. 1899.

ASSETS.		LIABILITIES.	
Stocks and bonds (market value)	$1,178,917.08	Capital stock paid in cash.	$1,500,000.00
Loans secured by collaterals	338,681.25	Cash collateral deposit	43,902.93
Cash on hand and in banks.	311,450.90	Surplus and reserve	541,690.73
Loans secured by mortgage	37,275.10		
Real estate	65,346.66		
Advances on real estate secured by deeds	21,249.83		
Furniture and fixtures	100.00		
Agents' balances, less commissions	100,779.02		
Due for subscriptions for the dept. of guaranteed attorneys	15,535.98		
Interest due and accrued	16,257.84		
	$2,085,593.66		$2,085,593.66

STATE OF NEW YORK, } ss.:
County of New York, }

Wyllys Benedict, being duly sworn, says that he is the attorney-in-fact of the United States Fidelity and Guaranty Company, and that to the best of his knowledge and belief the foregoing is a true and correct statement of the financial condition of said company as of June 30th, 1899, and that the financial condition of said company is as favorable now as it was when such statement was made.

WYLLYS BENEDICT.

Subscribed and sworn to before me this 9th day of August, 1900.

[SEAL.] HOWARD McCLURE,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

50 (Orig. endorsed:) N. Y. supreme court. In the matter of the petition of Charles F. W. Neely for a writ of *habeas corpus.* Bond. I hereby approve the within bond, both as to form and

sufficiency. Dated August 10, 1900. Wm. J. Wallace, U. S. circuit judge. U. S. circuit court. Filed Aug. 11, 1900. John A. Shields, clerk.

51 *Assignment of Errors.*

In the Supreme Court of the United States.

In the Matter of the Petition of CHARLES F. W. NEELY for a Writ of *Habeas Corpus.*

Now comes the petitioner, Charles F. W. Neely, by John D. Lindsay, his counsel, in connection with his petition of appeal from the order of the circuit court of the United States in and for the southern district of New York, entered herein the ninth day of August, 1900, denying a writ of *habeas corpus* herein, and makes and files the following assignment of errors:

The court erred:

1. In denying the petitioner's application for a writ of *habeas corpus.*

2. In refusing to grant the said application.

3. In deciding that it appears from the petition itself that the relator is not entitled to such writ.

4. In holding that the petitioner is lawfully held in custody under the warrant of arrest issued under the act of Congress passed June 6th, 1900, entitled "An act amending section 5270 of the Revised Statutes of the United States."

5. In holding that the enactment of said act of Congress was a valid exercise of the legislative power vested in Congress by the Constitution of the United States.

6. In holding that the United States or the President of
52 the United States, or any officer, department, or branch of the United States Government, has authority under the Constitution of the United States to occupy or control the territory of a friendly foreign nation, or any part thereof, in time of peace, or to establish a military government therein, or to rule the same by martial law or otherwise.

7. In holding that the present government established by the President of the United States in the island of Cuba is warranted or sanctioned by the Constitution of the United States.

8. In holding that the President of the United States or the military authorities thereof, or any department of the United States Government, has authority under the Constitution of the United States to govern the island of Cuba or to interfere in any way or to any extent with the internal affairs of said island.

9. In holding that the President of the United States or the military authority thereof, or any other department of the United States Government, has authority under the Constitution of the United States to establish or enforce the judicial system now in operation in the island of Cuba or any executive, legislative, or judicial authority therein.

10. In holding that the courts established by the military government of the island of Cuba and now in operation there have any legal existence.

11. In holding that the so-called "postal code" of the island of Cuba has any legal force or effect.

12. In holding that American citizens may, under the provisions of the Constitution of the United States, be lawfully extra-
52a dited to Cuba for trial therein in the courts now existing in said island.

13. In holding that under the Constitution of the United States Congress may subject a citizen of the United States, not enlisted or commissioned in the military service of the United States Government or subject to the articles of war or the rules and regulations of the United States Army, to martial law in time of peace.

14. In holding that Congress has power under the Constitution of the United States to authorize the extradition of an American civilian citizen in time of peace to a country occupied by the United States and governed by martial law by the President, as the Commander-in-chief of the United States, in order that such citizen may be there tried by a tribunal created by the United States military authorities.

15. In holding that under the Constitution of the United States the island of Cuba or any part thereof is now or has been at any time lawfully occupied by or under the control of the United States.

16. In holding that there is any right or power in the authorities at present in control of the island of Cuba to secure to any person a fair and impartial trial in Cuba within the spirit and meaning of the United States Constitution.

17. In holding that under existing conditions a person extradited to Cuba can there secure or be accorded a fair and impartial trial within the spirit and meaning of the United States Constitution.

18. In holding that there was evidence before the circuit judge in the proceedings which resulted in the petitioner's commit-
53 ment, establishing or tending to establish that he was or had ever been guilty of a violation of any criminal law in force in Cuba by the commission of any one or more of the crimes specified in the said act of Congress.

By reason whereof the petitioner prays that the said order denying his application for a writ of *habeas corpus* be reversed, and that your petitioner be discharged from custody.

CHARLES F. W. NEELY, *Petitioner,*
By JOHN D. LINDSAY,
One of His Attorneys and of Counsel.

JOHN D. LINDSAY,
Counsel for Petitioner.

54 (Orig. endorsed:) Supreme Court of the United States. In the matter of the petition of Charles F. W. Neely for a writ of *habeas corpus.* Assignment of errors. Nicoll, Anable &

Lindsay, attorneys for Charles F. W. Neely, 31 Nassau street, New York. Service of the within assignment of errors is hereby admitted this 10 day of August, 1900. Rec'd Aug. 9, 1900. W. J. W. Henry L. Burnett, U. S. att'y, attorney for U. S. Wm. Henkel, U. S. marshal, S. D. N. Y. U. S. circuit court. Filed Aug. 10, 1900. John A. Shields, clerk.

55 By the Honorable William J. Wallace, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To Hon. Henry L. Burnett, United States district attorney for the southern district of New York; William Henkel, United States marshal for the southern district of New York, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at the Capitol, in the city of Washington, in the District of Columbia, on the 7th day of September, 1900, pursuant to a petition of appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Charles F. W. Neely is the appellant and you, the said marshal, are appellee, to show cause, if any there be, why the final order of the said circuit court in said petition of appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand, at the borough of Manhattan, in the city of New York, in the district and circuit above mentioned, this 11th day of August, in the year of our Lord one thousand nine hundred.

WM. J. WALLACE,

Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

56 (Orig. endorsed:) United States circuit court. Charles F. W. Neely, appellant, against William Henkel, appellee. Citation. Nicoll, Anable & Lindsay, attorneys for appellant, 31 Nassau street, New York. Service of the within citation is hereby admitted this 13 day of August, 1900. Henry L. Burnett, U. S. attorney for S. D. N. Y. William Henkel, U. S. marshal, S. D. N. Y. U. S. circuit court. Filed Aug. 13, 1900. John A. Shields, clerk.

57 UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one (1) to fifty-five (55), inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause entitled In the matter of the application of Charles F. W. Neely, by John D. Lindsay, his att'y, for a writ of *habeas corpus*, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court t
be hereunto affixed, at the city of New Yor
Seal of U. S. Circuit Court, South. Dist. New York.
in the southern district of New York, in th
second circuit, this fifteenth day of August, i
the year of our Lord one thousand nine hu
dred, and of the Independence of the sai
United States the one hundred and twenty-fifth.

JOHN A. SHIELDS, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Aug. 15, 1900.]

[Endorsed:] United States circuit court of appeals for the secon
circuit. —— —— *vs.* —— ——. Transcript of record from th
circuit court of the United States for the southern district of Ne
York.

Endorsed on cover: File No., 17,872. S. New York C. C. U. S
Term No., 387. Charles F. W. Neely, appellant, *vs.* William Henke
United States marshal for the southern district of New York. File
August 16, 1900.

30041

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 486.

CHARLES F. W. NEELY, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 30, 1900.

(17,891.)

(17,891.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 406.

CHARLES F. W. NEELY, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 30, 1900.

1 To the circuit court of the United States in and for the southern district of New York, in the second judicial circuit:

The petition of Charles F. W. Neely, by John B. Lindsay, his attorney and counsel, respectfully shows:

I. That your petitioner is a native-born citizen of the United States, an inhabitant and citizen of the State of Indiana, and a resident of the city of Muncie, in the said last-mentioned State.

II. That your petitioner is not enlisted or commissioned in the military service of the United States and is not subject to the articles of war or the rules or regulations of the United States Army, but is a civilian and, as your petitioner is advised by counsel and verily believes, in no manner, directly or indirectly, amenable to the disciplinary or other power or jurisdiction of the military branch of the United States Government.

III. That your petitioner is now actually imprisoned and restrained of his liberty and detained, by color of the authority of the United States, in the custody of William Henkel, Esquire, the United States marshal in and for the southern district of New York, to wit, at the borough of Manhattan of the city of New York, in the said district, under the following circumstances:

1. On or about the 27th day of June, 1900, at the borough of
2 Manhattan of the city of New York, in the southern district of New York, Ernest E. Baldwin, Esquire, then and yet being assistant United States attorney in and for the district aforesaid, appeared before the Honorable E. Henry Lacombe, circuit judge of the United States in and for the second circuit, and laid before the said circuit judge two certain complaints in writing and upon oath, copies of which are hereto annexed, marked "A" and "B" respectively.

2. Thereupon, to wit, on the same said last-mentioned day, the said circuit judge issued two certain warrants for your petitioner's arrest, copies of which and of the endorsements thereafter placed thereon, as hereinafter alleged, are hereto annexed, marked "C" and "D" respectively.

3. Thereafter and on the 29th day of June, 1900, your petitioner was arrested and taken into custody and brought before the said circuit judge, at the United States courts and post-office building, in said borough, by the said United States marshal under color and by pretence of the authority of the said warrants.

4. Thereupon, to wit, on the said 29th day of June, 1900, at the borough aforesaid, your petitioner being represented before the said circuit judge by counsel, Henry L. Burnett, Esquire, United States attorney for the district aforesaid; the said Ernest E. Baldwin, Esquire, assistant United States attorney, as aforesaid, and Edward K. Jones, Esquire, special attorney general of the United States, appeared before the said circuit judge and made an application to the said circuit judge for your petitioner's extradition to Cuba under the said complaints; whereupon counsel for your peti-

tioner moved for a dismissal of the said complaints upon
3 various grounds, and among others:

First. That the act of Congress hereinafter referred to, being the act upon which the said proceedings were based and the sole authority therefor, was unconstitutional and void and conferred no jurisdiction upon the said circuit judge; that there was no power in Congress, under the Constitution of the United States, authorizing the enactment of the said measure, and that the same was not a necessary or appropriate instrumentality for carrying into effect or executing any of the known powers of Congress; that the said act, if applicable to the defendant and to the situation set forth in the said complaints, would enable an American citizen to be subjected to the jurisdiction of a military government maintained by the President of the United States in friendly foreign territory in time of absolute peace; that no authority for such military government exists or can exist under the Constitution of the United States, and that the said act sought to aid the military branch of the United States Government in the maintenance and execution of an illegal and unwarranted usurpation of the sovereignty of the Cuban people.

Second. That neither of the said complaints charged your petitioner with having committed an offense against any law in force in foreign territory lawfully occupied by or under the control of the United States.

5. The said motion was denied; whereupon the United States attorney offered in evidence in support of the said complaints
4 certain depositions taken in Cuba, as evidence tending to establish probable cause that your petitioner was guilty of the supposed offenses set forth in the said complaints.

6. The proceedings under the said complaints and warrants were thereupon adjourned to the 23rd day of July, 1900, when certain oral evidence in support of the said complaints was introduced by the Government. Further evidence in the said proceedings for the Government, and also on the part of the defendant, was introduced on the 24th day of July, and the case was on that day submitted to the circuit judge for his decision.

7. That at the conclusion of the said proceedings, to wit, on the said 24th day of July, the said circuit judge remanded your petitioner to the custody of the said United States marshal under the said warrants pending and until his decision of the question whether the evidence so introduced before him, as aforesaid, established probable cause that your petitioner was guilty of the offenses charged in the said complaints or of either of the offenses so charged, and thereupon placed upon each of the said warrants an endorsement in the following language, to wit:

"Remanded till decision.
July 24, 1900.

E. H. LACOMBE, *U. S. C. J.*"

8. That thereafter, to wit, on the 8th day of August, 1900, the said circuit judge handed down an opinion, a copy of which is

hereto annexed, marked "E," but that no decision in the premises has yet been entered.

9. That the evidence in the said proceedings under the said warrants before the said circuit judge has not yet been certified to the Secretary of State, and that no order has yet been issued in the said proceeding for your petitioner's return and surrender to the authorities in control in Cuba for trial under the laws there in force, but that your petitioner is now virtually imprisoned and restrained of his liberty by the said William Henkel, Esquire, United States marshal, as aforesaid, in the said proceeding, claiming to so restrain your petitioner by color of the pretended authority of the said warrants of arrest and the said remands thereunder and pending the decision of the said circuit judge, as aforesaid.

10. Your petitioner is informed and verily believes that, notwithstanding the facts as above alleged, the said marshal, on the 13th day of August, 1900, placed upon each of said warrants an endorsement and certificate in which he, the said marshal, stated and certified (among other things) as follows: "And I further certify that the within-named Charles F. W. Neely is not and has not been detained by me by virtue of this warrant, and the same has not been executed, and I have made no return of the same."

IV. That the proceedings above described were instituted, prosecuted, and maintained, and your petitioner's present imprisonment, restraint, and retention under the said warrants are solely under color and pretense of the authority assumed to have been conferred in the premises by a certain act of Congress of June 6th, 1900, entitled "An act amending section 5270 of the Revised Statutes of the United States," a copy of which is hereto annexed, marked "F."

V. That, as your petitioner is advised by counsel and verily believes, at the time of the alleged commission of the offence charged in the said complaint, and at all times prior to the passage of the said act of Congress, there was no authority under the Constitution and laws of the United States for the extradition by the United States of persons charged with offenses committed in a foreign territory or at any place without the territorial jurisdiction of the United States, except in pursuance of treaty stipulations duly entered into for that purpose.

VI. That, as your petitionor is further advised by counsel and verily believes, the said act of Congress of June 6th, 1900, is in all respects, and especially in so far as it undertakes to afford a means of surrendering to the authorities now in control of the island of Cuba, for trial under the laws there in force, persons who shall violate or who have violated the criminal laws in force there by the commission of the offenses therein enumerated, or any offense violative of the Constitution of the United States, *and* utterly void and ineffective and conferred no authority upon the circuit judge to entertain the extradition proceedings which resulted in your petitioner's arrest and remand under the said warrants, as aforesaid, and that your petitioner's arrest and detention in the said proceedings under the said warrants and the said remand are without any authority of

law whatsoever and in violation of his rights, privileges, and immunities under the Constitution and laws of the United States for the following reasons:

1. That the people of the island of Cuba are and at all times since the month of April, 1898, have been free and independant, and that the said island is a foreign country, regarding whose government or affairs Congress cannot competently legislate and in whose internal affairs the United States cannot lawfully interfere.

7 2. That by the joint resolution of Congress adopted April 19th, 1898, and approved by the President the following day, the political branch of the Government of the United States found and determined as matter of fact that the Cubans had a government of their own, capable of performing the duties and discharging the functions of an independant nation and having all the forms and attributes of nationality, entitling them to take and maintain a place in the great family of nations, and that such finding and determination of fact are absolutely binding and conclusive upon the judicial branch of the United States Government.

3. That the status of Cuba and of the people of Cuba as a free and independent nation has at all times since the adoption and approval of the said joint resolution remained and yet does remain unchanged.

4. That at the time of the adoption and approval of the said resolution a state of war existed between the people of the island of Cuba and the government of the Kingdom of Spain; various portions of the territory of the Cuban people were invaded by the Spanish forces, and certain parts thereof were occupied and controlled by such invading forces, and that by the adoption and approval of said joint resolution and upon the adoption and approval of the same the United States became the friendly ally of the Cuban people in its said war with Spain, and throughout the ensuing hostilities and until the termination of the said war the allied forces of the Cuban people and of the United States jointly waged war against the government of the Kingdom of Spain.

8 5. That the said war had been wholly terminated and was at an end on or about the 1st day of January, 1899, at which time all the invading Spanish forces had evacuated the island of Cuba.

6. That at no time since the 1st day of January, 1899, has there existed a state of war between the Government of the United States and the Kingdom of Spain; that there has never existed a state of war between the United States and the Cuban people, but, on the contrary, the United States and the Cuban people have at all times during the existence of the latter as an independent nation been on terms of perfect peace and amity.

7. That during the latter part of the said war and until peace was established a part of the Army of the United States, consisting of several thousand officers and soldiers, was stationed in Cuba, and, in co-operation with the army of the Cuban people, conducted in the said island various military operations in the prosecution of the war and for its successful conclusion.

8. That on the 13th day of December, 1898, the Secretary of War of the United States made and issued an order wherein and whereby, by direction of the President, a division to be known as the division of Cuba, consisting of the geographical department and provinces of the said island of Cuba, with headquarters in the city of Havana, was created under command of a major general of the United States Army, who, in addition to command of the United States troops in the said division, was by the said order directed to exercise
9 the authority of military governor of the said island.

9. That when the said war was at an end and the island of Cuba pacified and actual peace existed there, the said military forces of the United States being still stationed in Cuba, the President of the United States, as the Commander-in-chief of the Army of the United States, instead of withdrawing the army from the said island and leaving the government and control thereof to the Cuban people, kept and continued the army and yet does keep and continue it there.

10. That thereupon the President, as such commander-in-chief, set up and established in the said island a military form of government, to wit, a government thereof by martial rule, and at all times since the said 1st day of January has there maintained and yet does maintain such military government of the island of Cuba and over the affairs of the Cuban people, thereby usurping and entirely suspending the government and control of the island by its people and substituting in its place martial rule.

11. That at all times since the said 1st day of January, 1899, the President of the United States has maintained such martial rule in Cuba and throughout the territory of that island through a military governor appointed by him and by force of the army under his command.

12. That the said military governor assumes to exercise and has ever since the said 1st day of January, 1899, actually exercised absolute executive, legislative, and judicial power over the affairs of the island of Cuba and over the Cuban people and rules the same
10 by his sole and uncontrolled will, subject to no superior authority save that of the President of the United States as Commander-in-chief of the United States Army.

13. That in the exercise of such martial rule the military governor has taken into his hands and has subjected and now subjects to his absolute authority all the departments of government in that island. He assumes and actually exercises absolute power and authority, not only over the persons and property of the citizens of Cuba, but over the persons and property of all persons in the island there resident or mere sojourners and whether citizens of Cuba or of the United States or of any other nation, to the same extent and in the same manner as though Cuba were hostile foreign territory in the military occupation of the United States in time of war and the United States were an invader or conqueror of territory belonging to an enemy nation and were entitled to exercise the power of belligerent right. He assumes to enact, modify, amend, or repeal laws, establish, reorganize, or abolish courts, civil and criminal;

adopt or change rules of judicial procedure, and in general to deal with the administration of justice in the island as he sees fit.

14. That on the said 1st day of January the said military governor published a proclamation addresses "To the people of Cuba," wherein and whereby he declared (among other things) that the civil and criminal code which prevailed in Cuba prior to the relinquishment of Spanish sovereignty would remain in force,
11 with such modifications and changes as might from time to time be found necessary in the interest of good government.

15. That on the 11th day of January, 1899, he issued a military edict or order, whereby he ordered that thereafter the civil government of Cuba should be administered by four departments, to be known as the department of state and government, the department of finance, the department of justice and public instruction, and the department of agriculture, commerce, industries, and public works, each under the charge of a secretary, and on the following day he caused to be published an announcement of the appointment by him of secretaries of such departments.

16. That on the 14th day of April, 1899, he caused to be published a military order creating a supreme court, with jurisdiction throughout Cuban territory, composed of a president or chief justice, six associate justices, one fiscal, two assistant fiscals, one secretary or chief clerk, two deputy clerks, and other subordinate employees, with administrative functions as well as those of a court of justice in civil and criminal matters.

17. That by article XXXVII of the same order he declared that to be eligible for appointment to the office of president, justice, fiscal, assistant fiscal, or deputy clerk of the supreme court the person must (among other things) be a Cuban or declare on oath that he accepts Cuban citizenship, provided he be a person included within the provisions of article 9 of the "treaty of Paris of December 10th, 1898."

18. That on the 15th day of June, 1899, he issued a military edict or order whereby he declared that thereafter the "audiencias"
12 of the island of Cuba should be organized and should exercise jurisdiction in accordance with the provisions of the said last-mentioned edict or order.

19. That by article XLI of the same order he declared article XXXVII (before mentioned) of the order creating the supreme court applicable to the functionaries of the "audiencia."

20. That the supreme court, the "audiencias," and certain tribunals called "courts of first instance" are at present the only courts in Cuba exercising or assuming criminal jurisdiction; that all of said courts are at present organized, controlled, and operated by the military governor, who assumes power to appoint, suspend, and remove their members, officers, and employees at his pleasure.

21. That said courts act as the mere agents and instruments of the military governor and are wholly dependent for their existence and continuance upon his will.

22. That under the military system now in force there is no means of trying offenders against the laws in force in Cuba (if any

there be) except through the instrumentality of said courts or such other courts as the military governor may see fit to erect.

23. That there is no authority in the Constitution of the United States for the occupation or control by the United States of the territory of a friendly foreign nation or for the government of such foreign territory by the United States by martial law or otherwise in time of peace, and that the form of government now
13 maintained by the United States in Cuba is wholly illegal and without authority under the Constitution of the United States.

24. That there is no authority in the Constitution of the United States for the exercise by the United States military authorities through the President, as commander-in-chief or otherwise, of jurisdiction over United States citizens who are civilians and not commissioned or enlisted in the military service, even in time of war, except in hostile territory in the forcible military occupation of the United States forces, and that in time of peace neither martial law nor military jurisdiction of any kind can lawfully be employed or exercised by the United States authorities as against civilian citizens even in the United States, much less in friendly foreign territory.

25. That the said act of Congress of June 6th, 1900, is therefore unconstitutional and void, in that—

(*a.*) There is no authority in the Constitution for its enactment by Congress, the legislative power granted to Congress by the Constitution not extending to the enactment of any such measure.

(*b.*) It seeks to aid the President of the United States and the military governor appointed by him in the maintenance in foreign territory, in time of peace, of an unlawful and unauthorized military jurisdiction.

(*c.*) It seeks to give legal countenance and support to an unwarranted and unjustifiable invasion by the United States military forces of the territory of a friendly foreign power and the
14 wrongful usurpation of the functions of sovereignty belonging to such foreign nation.

(*d.*) It seeks to subject American citizens who are civilians and not in the military service to martial rule in time of peace.

XI. That, as your petitioner is advised by counsel and verily believes, the said act of Congress conferred no jurisdiction upon the circuit judge to entertain the extradition proceedings herein or to issue the warrants aforesaid; that the said warrants were issued without legal right, authority, or jurisdiction of any kind and are utterly void and ineffectual, and that your petitioner's arrest, remand, detention, and imprisonment thereunder are in violation of the Constitution of the United States and in violation of his rights, privileges, and immunities thereunder.

XII. That prior to the institution of the extradition proceedings aforesaid your petitioner was arrested and taken into custody under an order of arrest issued by the said the Honorable E. Henry Lacombe in a civil action brought by the United States for the recovery of certain moneys alleged to have been wrongfully converted by your petitioner, and that the petitioner is now detained

and in the custody of the said marshal under and by virtue of the said order of arrest as well as under color of the authority of the warrants aforesaid in the said extradition proceeding.

XIII. That your petitioner is convinced that it would be unwise and prejudicial to his interests to defer the making of this application until the issuance of a final order of extradition herein, for the reason that, as your petitioner is informed and verily believes, the United States Government authorities have made arrangements for the placing of the petitioner on board a Government transport or other vessel for immediate transportation to Cuba as soon after the issuance of such an order as may be and in such prompt manner and under such circumstances as will prevent and are intended to prevent your petitioner from making an application for a writ of *habeas corpus* at that time, and your petitioner verily believes that unless he makes the same before said order is issued he will be absolutely deprived of the benefit of such relief and of all opportunity to secure a review of the constitutional questions herein presented.

Wherefore your petitioner prays that a writ of *habeas corpus*
15 may issue, directed to the said William Henkel, marshal, or to any of his deputies, requiring him or them to bring and have your petitioner before this court at a time to be by it determined, together with the true cause of his detention, to the end that an inquiry may be had into the cause of the restraint of your petitioner under the said warrants in the said extradition proceedings and the remands thereunder so endorsed thereon, as aforesaid, and that this court may proceed in a summary way to determine the facts of the case in that regard, and the question of the constitutionality of the act under which the said warrants were issued, and the legality of your petitioner's arrest, remand, imprisonment, restraint, and detention thereunder, now imposed upon him, and thereupon to dispose of your petitioner as law and justice require.

And your petitioner will ever pray.

Dated at the city of New York aforesaid the 20th day of August, 1900.

CHARLES F. W. NEELY, *Petitioner,*
By JNO. D. LINDSAY,
His Attorney and Counsel.

JOHN D. LINDSAY,
Attorney for Petitioner, 31 *Nassau Street,*
Manhattan, New York City.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

John D. Lindsay, being duly sworn, says that he is the attorney for the petitioner named in the foregoing petition; that he
16 has read the said petition, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true, and that he makes this application at the re-

quest of the petitioner, who is unable to appear and make the same in person.

(S'g'd) JNO. D. LINDSAY.

Sworn to before me this 20th day of August, 1900.

(S'g'd) WM. J. WALLACE,
U. S. Circuit Judge.

17 EXHIBIT "A."

Before Honorable E. Henry Lacombe, judge of the circuit court, southern district of New York.

In the Matter of the Application for the Extradition of CHARLES F. W. NEELY, Finance Officer of the Department of Posts, Cuba, Charged with Embezzlement and Malversation in Office under Article 401 of the Laws of Cuba, Pursuant to an Act of Congress Amendatory of Sec. 5270, R. S., Approved June 6, 1900.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Ernest W. Baldwin, assistant United States attorney in and for said district, being duly sworn, deposes and says upon information and belief:

First. That one Charles F. W. Neely, being then and there a public employee, to wit, finance agent of the department of posts in the city of Havana, island of Cuba, on the 6th day of May, in the year of our Lord nineteen hundred, or about that time, having then and there charge of the collection and deposit of moneys of the department of posts of the city of Havana aforesaid, did unlawfully and feloniously take and embezzle from the public funds of the
18 said island of Cuba the sum of ten thousand dollars and more, being moneys and funds which then and there had come into his charge and under his control in his capacity as such public employee and finance agent, as aforesaid, and by reason of his said office and employment, thereby violating chapter X, article 401, of the penal code which was then and there and which is now in force in the said island of Cuba.

Second. That the said Charles F. W. Neely is a fugitive from justice from the said island of Cuba and is now within the territory of the United States of America, to wit, in the city of New York, in the southern district of New York.

Third. That the crime of which the said Charles F. W. Neely has so as aforesaid been guilty is an offense within the meaning of an act of Congress entitled "An act amending section fifty-two hundred and seventy of the Revised Statutes of the United States," approved June 6th, 1900, to wit, that part of said act of Congress relating to the "embezzlement or criminal malversation of the public funds committed by public officers, employees, or depositaries."

Fourth. That the said island of Cuba is a foreign country occupied by and under the control of the United States.

Fifth. That the said Charles F. W. Neely, as deponent is informed and believes, was indicted for the crime of embezzlement of public funds in the said city of Havana on the said 6th day of May, 1900, an order being then and there regularly and duly entered to that effect by the judge of the court of the first instance and instruction of the cathedral district of the said city of Havana; that the judge of the said court thereupon decreed that the said Charles F. W. Neely should be arrested and that proper request should be made for his extradition. Whereupon Leonard Wood, major general United States volunteers, military governor of Cuba, under his hand and seal of the military government of the said island of Cuba, on the 13th day of June, 1900, issued his requisition for such extradition to his Excellency the President of the United States.

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Sixth. That deponent's information and belief are based upon the said requisition and the proofs and papers attached to and accompanying the same.

ERNEST E. BALDWIN.

Subscribed and sworn to before me this 27th day of June, A. D. 1900.

E. HENRY LACOMBE,
Circuit Judge.

20

EXHIBIT "B."

Before Honorable E. Henry Lacombe, judge of the circuit court, southern district of New York.

In the Matter of the Application for the Extradition of CHARLES F. W. NEELY, Employed in a Branch of the Department of Posts, Cuba, Charged with Embezzlement and Conversion of Postage Stamps, Moneys, etc., under Sections 37 & 55 of the Postal Code for the Island of Cuba.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

Ernest E. Baldwin, assistant United States attorney in and for said district, being duly sworn, deposes and says upon information and belief:

First. That one Charles F. W. Neely, at the times hereinafter mentioned, being then and there employed in and connected with the business and operations of a branch of the service of the department of posts, to wit, in the city of Havana, island of Cuba, did unlawfully and fraudulently, between the dates of July 1st, 1899, and May 1st, 1900, embezzle and convert to his own use postage stamps, money, funds, and property belonging to or in the custody of the department of posts of Cuba, which had come into his possession and under his control in the execution of his said employment and service and under color and claim of authority as such employee—that is to say, to the amount and value of more

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than fifty-seven thousand dollars in gold of the United States currency, in violations of Section- 37 and 55 of the postal code of the said island of Cuba.

Second. That the said Charles F. W. Neely is a fugitive from justice from the said island of Cuba and is now within the territory of the United States of America, to wit, in the city of New York, in the southern district of New York.

Third. That the crime of which the said Charles F. W. Neely has so, as aforesaid, been guilty is an offense within the meaning of an act of Congress entitled "An act amending section fifty-two hundred and seventy of the Revised Statutes of the United States," approved June 6th, 1900, to wit, that part of said act of Congress relating to the embezzlement or criminal malversation of public funds committed by public employees."

Fourth. That the said island of Cuba is a foreign county occupied by and under the control the United States.

Fifth. That the said Charles F. W. Neely, as deponent is informed and believes, was indicted for the crime of malversation of public funds confided to him by reason of his employment, as aforesaid, and was so declared to be indicted on the 18th day of May, A. D. 1900, in the said city of Havana, an order being then and there regularly and duly entered to that effect by the judge of the
22 court of first instance and instruction of the district of the cathedral of said city of Havana, said indictment being based upon the declaration under oath of George L. Seybolt, acting chief special agent of the department of posts aforesaid, and of Harry H. Williams, special agent thereof, and a proper request has been made for the extradition of said Charles F. W. Neely, bearing date the said 18th day of May, 1900, in order that the said Charles F. W. Neely may be brought to trial before the proper courts of said island for the crime of which he stands accused, the said request for extradition being signed by Leonard Wood, military governor of Cuba, under his hand and the seal of the military government of the said island of Cuba, and being addressed to his excellency the Honorable William McKinley, President and Chief Magistrate of the United States of America.

Sixth. That deponent's information and belief are based upon the said requisition and the proofs and papers attached to and accompanying the same.

ERNEST E. BALDWIN.

Subscribed and sworn to before me this 27th day of June, A. D. 1900.

E. HENRY LACOMBE,
Circuit Judge.

23 EXHIBIT "C."

Warrant of Arrest.

The President of the United States of America to the marshal of the United States for the southern district of New York, his deputies or either of them:

Whereas complaint has been made on oath under the provisions of the act of Congress approved June 6th, 1900, entitled "An act amending section fifty-two hundred and seventy of the Revised Statutes of the United States," before me, E. Henry Lacombe, a judge of the circuit court of the United States in and for said district, duly authorized by law, that one Charles F. W. Neely, being then and there a public employee, to wit, finance agent of the department of posts in the city of Havana, island of Cuba, on the 6th day of May, in the year of our Lord one thousand nine hundred, or about that time, having then and there charge of the collection and deposit of moneys of the department of posts of the said city of Havana, did unlawfully and feloniously take and embezzle from the public funds of the said island of Cuba the sum of ten thousand dollars and more, being then and there moneys and funds which had come into his charge and under his control in his capacity as such public employee and finance agent, as aforesaid, and by reason of his said office and employment, thereby violating chapter 10, article 401, of the penal code of the said island of Cuba—that is to say, a crime
24 within the meaning of the said act of Congress approved June 6th, 1900, as aforesaid, relating to the "embezzlement or criminal malversation of the public funds committed by public officers, employees, or depositaries"—as will more fully appear by a reference to the said complaint:

Now, therefore, we command you forthwith to take him, the said Charles F. W. Neely, and bring him before me, the said judge, in order that the evidence of probable cause as to the guilt of the said Charles F. W. Neely of the offense charged against him may be heard and considered, and, if deemed sufficient, that the same may be certified, with a copy of all the proceedings, to the Secretary of State, that an order may issue for the return and surrender of the said Charles F. W. Neely pursuant to the authority of the said act of Congress.

Witness my hand and the seal of the said circuit court this 27th day of June, 1900.

E. HENRY LACOMBE,
Circuit Judge.

Endorsed: "Remanded till decision. July 24, 1900. E. H. Lacombe, U. S. C. J."

25 EXHIBIT "D."

Warrant of Arrest.

The President of the United States of America to the marshal of the United States for the southern district of New York, his deputies or either of them:

Whereas complaint has been made on oath under the provisions of the act of Congress approved June 6th, 1900, entitled "An act amending section fifty-two hundred and seventy of the Revised Statutes of the United States," before me, E. Henry Lacombe, a judge of the circuit court of the United States in and for said district, duly authorized by said act of Congress, that one Charles F. W. Neely, being then and there employed in and connected with the business and operations of a branch of the service of the department of posts, to wit, in the city of Havana, island of Cuba, between the dates of July 1, 1899, and May 1, 1900, while so employed, did unlawfully and fraudulently embezzle and convert to his own use postage stamps, moneys, funds, and property belonging to or in the custody of the department of posts of Cuba, which had come into his possession and under his control in the execution of his said employment and service and under color and claim of his authority as such employee—that is to say, to the amount and value of more than fifty-seven thousand dollars in gold of the United States currency—in violation of sections 37 and 55 of the postal code
26 of the said island of Cuba—that is to say, a crime within the meaning of the said act of Congress approved June 6th, 1900, as aforesaid, relating to the "embezzlement or criminal malversation of the public funds committed by public employees"—as will more fully and at large appear by reference to the said complaint:

Now, therefore, we command you forthwith to take him, the said Charles F. W. Neely, and bring him before me, the said judge, in order that the evidence of probable cause as to the guilt of the said Charles F. W. Neely of the offense charged against him may be heard and considered, and, if deemed sufficient, that the same may be certified, with a copy of all the proceedings, to the Secretary of State, that an order may issue for the return and surrender of said Charles F. W. Neely pursuant to the authority of the said act of Congress.

Witness my hand and the seal of the said circuit court this 27th day of June, 1900.

E. HENRY LACOMBE,
Circuit Judge.

Endorsed: "Remanded till decision. July 24, 1900. E. H. Lacombe, U. S. C. J."

27 "EXHIBIT E."

United States Circuit Court, Southern District of New York.

In the Matter of the Application for Extradition of CHARLES F. W. NEELY to Cuba.

LACOMBE, *Circuit Judge:*

The various preliminary objections have been disposed of in the former opinion. Upon the hearing, counsel for the prisoner offered to prove by witnesses that a fair and impartial trial cannot be secured to the prisoner in the island of Cuba. Reliance is placed upon the report of the Judiciary Committee of the Senate recommending the passage of the act of June 6th, 1900, the concluding paragraph of which reads as follows:

"In order that there may be no vexatious exercise of the power of extradition under this act, it is provided that there shall be shown probable cause before a judge of the appropriate court, who shall order the returns and surrender, but no such order shall be made until the judge shall be satisfied that the accused will have a speedy and fair trial."

If the statute had passed in the language recommended by the Judiciary Committee there would be force in this argument,
28 but the history of the enactment is conclusive against the conducting of any such investigation by this court. When the bill came from the House of Representatives the concluding sentences read as follows:

"Provided further, that such proceedings shall be had before a judge or a justice of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged. If so held, such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authority shall guarantee to such person a fair and impartial trial."

The Judiciary Committee of the Senate reported in favor of "striking out all after the enacting clause" and substituting an enactment which should contain, *inter alia*, the following:

"Provided further, that before making such order of surrender and return the judge shall be satisfied that proper provision exists for securing to the accused a speedy and fair trial for such offense, where he will be informed of the nature and cause of the accusation, and be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defense."

Congress, however, rejected this amendment proposed by the Judiciary Committee and passed the act in substantially the language above quoted from the House bill. Manifestly, therefore, this court
should not enter upon the investigation proposed. Its sole
29 function is to determine whether there is probable cause that the prisoner is guilty of the offense charged, such offense being one of those enumerated in the act.

It will not be necessary to discuss the testimony covering the entire period of the prisoner's incumbency. Touching the six weeks from January 1st, 1900, to February 10th, 1900, the evidence is more compact and specific than it is for the other months.

It appears that Neely was the head of the bureau of finance in the department of posts of the island of Cuba. That bureau issued "stamped paper" (*i. e.*, stamps, postal cards, stamped envelopes, etc.) to the bonded postmasters of the island, upon their requisition, and received the remittances made by them to pay for the same. Such remittances came by registered mail, usually in the shape of drafts and warrants, cash, or money orders. The unbonded postmasters received stamps and paid cash. To the bonded postmasters there were sent receipts for their remittances, such receipts being torn out of a book containing stubs. Entries of such remittances were also made in a book called "Small Cash Book, Exhibit A." In this cash book were also entered the items of cash payments by unbonded postmasters. Deposits of these funds were made every ten days in the North American Trust Company, the payments accumulating meanwhile in the safe. When a deposit was made a deposit slip in the usual form was made out and turned in with the funds. Now, for the period from January 1st, 1900, to February 10, 1900, we have the small cash book, Exhibit A, showing receipts of money from postmasters. George W. Marshall, who has been employed in the bureau continuously since February, 1899, testified under oath before the court that every entry in the book for that period is in his own handwriting; that he knew of the transaction at the time, having himself prepared the receipt for the postmaster, which Neely signed, and that his entry was accurately made. It is, of course, possible that through error or oversight or otherwise other money may have been received and not entered, but that such amounts as are entered were received is sworn to positively by a witness having personal knowledge of the facts and is wholly uncontradicted. These items aggregate $38,967.29. The teller or clerk in charge at the North American Trust Company testified to the deposits made during the same period, and that none others than those he swore to were made during that period. He produced the original deposit slips. The witness Marshall, being shown these slips, went on the stand, identified them and swore that, except *from* a memorandum in Neely's handwriting on the slip of January 6th, 1900, they were entirely in his own handwriting and accurately represented the deposits made by him on the date given. They are as follows:

Jan. 6, 1900	4,000
" 10, 1900	3,000
" 20, 1900	5,700
" 30, 1900	4,830
Feb. 10, 1900	4,907.57
Total	$24,437.57

31 The difference between receipts and deposits is $14,529.72. Some slight discrepancy by difference of time between receipt and deposit on the same day is, of course, to be expected, but the evidence of Marshall, direct and positive, not contradicted or impeached or qualified or shaken on cross-examination, should satisfy any jury beyond reasonable doubt that $14,000, or thereabouts, of funds received from the sale of stamped paper was lost, stolen, or embezzled after it reached the bureau.

It further appears that Neely was in charge of the bureau and directed its business methods; that he himself opened the mail containing the money and either wrote the receipts himself or signed those which Marshall prepared and which were sent to the postmasters; that he had constant access to the books and examined them; that he frequently—almost daily—looked over the accumulating funds in the safe, doing them up in bundles for convenience of counting and deposit; that he himself directed what should be the amount of each deposit after Marshall had reported how much loose silver there was in the drawer, and himself handed to Marshall sufficient currency or drafts to make up, with such loose silver, the amount he thus directed to be deposited; that, except for himself and Marshall (who had testified here to the correctness of his own transactions), there were changes in the personnel of the bureau, but that, as its records show, there was a uniform deficiency of deposits as compared with receipts from the beginning of Neely's administration until he left the island on leave, April 28th,

32 1900. It is, of course, possible that, while he was himself opening the mail, receiving the money, signing the receipts, handling the funds, counting them, moving them from drawer to drawer of the safe, and making them up for deposit, others, in the bureau or out of it, could have made away during six weeks with $14,000—over 35 % of the total receipts—under his eyes and almost out of his hands, without his knowledge or consent, but it is highly improbable.

In the opinion of this court, the Government has abundantly shown that there is probable cause to believe that Neely is guilty of the offense of "embezzlement or criminal malversation of the public funds," he being at that time a "public officer" or "employee" or "depositary." Such an offense is obnoxious to the penal code in force in Cuba, article 401 of which provides that "the public employee who, by reason of his office, has in his charge public funds or property and who should take (or consent that others should take) any part therefrom, shall be punished, etc." There is no merit in the contention that this article applies only to persons in the public employ of Spain. Spain having withdrawn from the island, its successor has become the "public" to which the code, remaining unrepealed, now refers. The suggestion that under this penal code no public employee could be prosecuted or punished until his superior had heard the case and turned the offender over to the criminal law for trial is matter of defense and need not be considered here. The evidence shows probable cause to

33 believe that the prisoner is guilty of an offense defined in the act of June 9th, 1900, and which is also a violation of the

criminal laws in force in Cuba, and upon such evidence he will be held for extradition.

Two obstacles to his extradition now exist. He has been held to bail in this court upon a criminal charge of bringing into this district government funds embezzled in another district. He has also been arrested in a civil action brought in this court to recover $45,000, which, it is alleged, he has converted. When both of these proceedings shall have been discontinued the order in extradition will be signed. This may be done on August 13th, at 11 a. m.

34 EXHIBIT F.

An act amending section fifty-two hundred and seventy of the Revised Statutes of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section fifty-two hundred and seventy of the Revised Statutes of the United States is hereby amended by adding thereto the following proviso:

"Provided, that whenever any foreign country or territory, or any part thereof is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of any of the following offences, namely: Murder and assault with intent to commit murder; counterfeiting or altering money; counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same; forgery or altering, and uttering what is forged or altered; embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries; larceny or embezzlement of an amount not less than one hundred dollars in value, burglary, defined to be the breaking and entering by night-time into the house of another person with intent to commit a felony therein, and the act of breaking and entering the house or
35 building of another, whether in the day or night time, with the intent to commit a felony therein; the act of entering or of breaking and entering the offices of the Government and public authorities, or the offense of — banks, banking-houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein; perjury or the subornation of perjury; rape; arson; piracy by the law of nations; murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government; malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life, and who shall depart or flee, or who has departed or fled, from justice therein to the United States, or to any Territory thereof, or to the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United

States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern
36 proceedings authorized by this proviso: Provided further, that such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged.

And provided further that no return or surrender shall be made of any person charged with the commission of an offense of a political nature.

If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such person a fair and impartial trial."

37 [Endorsed:] Circuit court of the United States, southern district of N. Y. In the matter of the application of Charles F. W. Neely for a writ of *habeas corpus*, &c. Copy. Petition for writ. John D. Lindsay, attorney for petitioner, 31 Nassau street, New York.

(Endorsed:) U. S. circuit court. Filed Aug. 20, 1900. John A. Shields, clerk.

38 At a stated term of the circuit court of the United States of America in and for the southern district of New York, in the second circuit, held at the United States court and post-office building, in the borough of Manhattan of the city of New York, on the 20th day of August, in the year of our Lord one thousand nine hundred.

Present: Hon. William J. Wallace, circuit judge.

In the Matter of the Petition of CHARLES F. W. NEELY for a Writ of *Habeas Corpus*.

On reading and filing the petition of Charles F. W. Neely, verified the 20th day of August, 1900, for a writ of *habeas corpus*, directed to William Henkel, Esqr., United States marshal in and for the southern district of New York, requiring him to bring and have the petitioner before this court, together with the true cause of his detention and restraint of the petitioner, to the end that this court may act thereupon as of right and according to law ought to be done, and it appearing from the said petition itself that the petitioner is not entitled to the said writ: now, after hearing John D. Lindsay, Esqr., of counsel for said petitioner, in support of said application, and due deliberation having been had, it is—

Ordered that such application be, and the same hereby is, in all things denied.

Enter.

(S'g'd) WM. J. WALLACE,
United States Circuit Judge.

39 [Endorsed:] U. S. circuit ct., so. dist. N. Y. In the matter of the petition of Charles F. W. Neely for a writ of *habeas corpus.* (Copy.) Order denying application. John D. Lindsay, attorney for petitioner, 31 Nassau street, New York.

(Endorsed:) U. S. circuit court. Filed Aug. 20, 1900. John A. Shields, clerk.

40 At a stated term of the circuit court of the United States in and for the southern district of New York, held at the United States court and post-office building, in the borough of Manhattan of the city of New York, on the 20th day of August, 1900.

Present: Hon. William J. Wallace, circuit judge.

In the Matter of the Petition of CHARLES F. W. NEELY for a Writ of *Habeas Corpus.*

CHARLES F. W. NEELY, Appellant,
against
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, Appellee.

An appeal having been duly taken to the Supreme Court of the United States by the above-named petitioner and appellant from an order this day entered herein, denying his application for a writ of *habeas corpus;* now, on motion of John D. Lindsay, attorney and solicitor for the petitioner—

It is ordered that pending the said appeal the custody of the said Charles F. W. Neely shall not be disturbed, and that he be and remain in the custody in which he is at present under the warrants issued by Judge Lacombe June 27th, 1900, to the United States marshal in and for the southern district of New York, and be kept

41 and detained in such custody pending and until the determination of the said appeal by the said Supreme Court of the United States and the further order of the court thereon.

Dated at the city of New York, in the southern district of New York, the 20th day of August, 1900.

Enter.

WM. J. WALLACE,
United States Circuit Judge.

42 [Endorsed:] Circuit court of the United States for the southern district of N. Y. In the matter of the petition of Charles F. W. Neely for a writ of *habeas corpus.* Order remanding petitioner. John D. Lindsay, attorney for Chas. F. W. Neely, 31 Nassau street, New York.

(Endorsed:) U. S. circuit court. Filed Aug. 20, 1900. John A. Shields, clerk.

43

Assignment of Errors.

In the Supreme Court of the United States.

In the Matter of the Petition of CHARLES F. W. NEELY for a Writ of *Habeas Corpus*.

CHARLES F. W. NEELY, Appellant,
against
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, Appellee.

Now comes the petitioner, Charles F. W. Neely, by John D. Lindsay, his counsel, in connection with his petition of appeal to the Supreme Court from the order of the circuit court of the United States in and for the southern district of New York, entered herein the 20th day of August, 1900, denying a writ of *habeas corpus* herein, and makes and files the following assignment of errors:

The court erred:

1. In denying the petitioner's application for a writ of *habeas corpus*.

2. In refusing to grant the said application.

3. In deciding that it appears from the petition itself that the relator is not entitled to such writ.

4. In holding that the petitioner is lawfully held in custody under the warrants of arrest issued under the act of Congress passed June 6th, 1900, entitled "An act amending section 5270 of
44 the Revised Statutes of the United States."

5. In holding that the enactment of said act of Congress was a valid exercise of the legislative power vested in Congress by the Constitution of the United States.

6. In holding that the United States or the President of the United States, or any officer, department, or branch of the United States Government, has authority under the Constitution of the United States to occupy or control the territory of a friendly foreign nation, or any part thereof, in time of peace, or to establish a military government therein, or to rule the same by martial law or otherwise.

7. In holding that the present government established by the President of the United States in the island of Cuba is warranted or sanctioned by the Constitution of the United States.

8. In holding that the President of the United States or the military authorities thereof, or any department of the United States Government, has authority under the Constitution of the United States to govern the island of Cuba or to interfere in any way or to any extent with the internal affairs of said island.

9. In holding that the President of the United States or the military authority thereof, or any other department of the United States Government, has authority under the Constitution of the United States to establish or enforce the judicial system now in operation

in the island of Cuba or any executive, legislative, or judicial authority therein.

10. In holding that the courts established by the military government of the island of Cuba and now in operation there have
45 any legal existence.

11. In holding that the so-called "postal code" of the island of Cuba has any legal force or effect.

12. In holding that American citizens may, under the provisions of the Constitution of the United States, be lawfully extradited to Cuba for trial therein in the courts now existing in said island.

13. In holding that under the Constitution of the United States Congress may subject a citizen of the United States, not enlisted or commissioned in the military service of the United States Government or subject to the articles of war or the rules and regulations of the United States Army, to martial law in time of peace.

14. In holding that Congress has power under the Constitution of the United States to authorize the extradition of an American civilian citizen in time of peace to a country occupied by the United States and governed by martial law by the President, as the Commander-in-chief of the United States, in order that such citizen may be there tried by a tribunal created by the United States military authorities.

15. In holding that under the Constitution of the United States the island of Cuba or any part thereof is now or has been at any time lawfully occupied by or under the control of the United States.

16. In holding that there is any right or power in the authorities at present in control of the island of Cuba to secure to any
46 person a fair and impartial trial in Cuba within the spirit and meaning of the United States Constitution.

17. In holding that under existing conditions a person extradited to Cuba can there secure or be accorded a fair and impartial trial within the spirit and meaning of the United States Constitution.

By reason whereof the petitioner prays that the said order denying his application for a writ of *habeas corpus* be reversed, and that your petitioner be discharged from custody.

(S'g'd) CHARLES F. W. NEELY, *Petitioner*,
By JOHN D. LINDSAY,
His Attorney & Counsel.

JOHN D. LINDSAY,
Counsel for Petitioner.

47 [Endorsed:] Supreme Court of the United States. In the matter of the petition of Charles F. W. Neely for a writ of *habeas corpus*. Assignment of errors. John D. Lindsay, attorney for petitioner, 31 Nassau street, New York.

(Endorsed:) Read the 20th day of August, 1900. (S'g'd) Wm. J. Wallace, U. S C. J. U. S. circuit court. Filed Aug. 20, 1900. John A. Shields, clerk.

48 Circuit Court of the United States for the Southern District of New York.

In the Matter of the Petition of CHARLES F. W. NEELY for a Writ of *Habeas Corpus.*

CHARLES F. W. NEELY, Appellant,
against
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, Appellee.

SIRS: Please take notice that Charles F. W. Neely, the petitioner above named, hereby appeals to the Supreme Court of the United States from the final order made and entered herein on the 20th day of August, 1900, denying his application for a writ of *habeas corpus*, and from each and every part of the said order.

Dated at the city of New York the 20th day of August, 1900.

Yours, &c., JOHN D. LINDSAY,
Attorney and Counsel for Petitioner, 31 Nassau St., Manhattan, N. Y. City, N. Y.

To Hon. Henry L. Burnett, United States attorney in and for the southern district of New York; William Henkel, Esquire, United States marshal for the southern district of New York, and John A. Shields, Esquire, clerk of the circuit court of the United States in and for the southern district of New York.

49 [Endorsed:] Circuit court of the United States for the southern district of N. Y. In the matter of the petition of Charles F. W. Neely for a writ of *habeas corpus*. Copy. Notice of appeal. John D. Lindsay, attorney for petitioner, 31 Nassau street, New York.

(Endorsed:) Service of a copy of within appeal admitted this 20th day of August, 1900. (S'g'd) William Henkel, U. S. marshal, S. D. N. Y. U. S. circuit court. Filed Aug. 20, 1900. John A. Shields, clerk.

50 Circuit Court of the United States, Southern District of New York.

In the Matter of the Petition of CHARLES F. W. NEELY for a Writ of *Habeas Corpus.*

CHARLES F. W. NEELY, Appellant,
against
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, Appellee.

The petition of the above-named petitioner for an order allowing an appeal to the Supreme Court of the United States from the final order hereinabove entered in this cause.

Charles F. W. Neely, the petitioner and appellant above named, feeling himself aggrieved by the final order heretofore made and

entered by this court in this cause on the 20th day of August, 1900, whereby it was ordered that his application for a writ of *habeas corpus*, directed to William Henkel, Esqr., United States marshal in and for the southern district of New York, requiring said marshal to bring and have your petitioner before this court, together with the true cause of his detention of your petitioner, be, and the same thereby was, denied, now comes, by John D. Lindsay, Esqr., his solicitor and counsel, and petitions this court for an order
51 allowing him, said petitioner, to prosecute an appeal from said final order to the Supteme Court of the United States under and according to the laws of the United States in that behalf made. Your petitioner is advised by counsel that there are grave doubts concerning the constitutionality of the statute upon which the proceedings referred to in the petition herein were based, and he desires in good faith to submit the constitutional questions involved to the Supreme Court for their determination.

And your petitioner will ever pray.

(S'g'd) CHARLES F. W. NEELY, *Petitioner*,
By JNO. D. LINDSAY,
His Attorney and Counsel.

JOHN D. LINDSAY,
Attorney for Petitioner, 31 *Nassau St.*,
Manhattan, N. Y. City, N. Y.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

John D. Lindsay, being duly sworn, says that he is the attorney for the petitioner; that the foregoing petition is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true, and that he makes this application for the allowance of an appeal at the request of the petitioner, who is unable to appear and make the same in person.

(S'g'd) JNO. D. LINDSAY.

Sworn to before me this 20th day of August, 1900.

(S'g'd) WM. J. WALLACE,
U. S. Circuit Judge.

The foregoing petition on appeal is granted and claim of appeal therein made is allowed. Supersedeas bond fixed at $250.

Done in open court this 20th day of August, 1900.

(S'g'd) WM. J. WALLACE,
United States Circuit Judge.

52 [Endorsed:] Circuit court of the United States, southern district of New York. In the matter of the petition of Charles F. W. Neely for a writ of *habeas corpus*. Copy. Petition of appeal and allowance thereof. John D. Lindsay, attorney for petitioner, 31 Nassau street, New York.

(Endorsed:) U. S. circuit court. Filed Aug. 20, 1900. John A. Shields, clerk.

53 Supreme Court of the United States.

In the Matter of the Petition of CHARLES F. W. NEELY for a Writ of *Habeas Corpus*.

CHARLES F. W. NEELY, Appellant,
against
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, Appellee.

Know all men by these presents that we, Charles F. W. Neely, as principal, and The United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the United States of America in the full and just sum of two hundred and fifty dollars, to be paid to the United States; to which payment, well and truly to be made, we bind ourselves, our heirs and executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of August, 1900.

Whereas lately, to wit, on this the 20th day of August, 1900, at a circuit court of the United States in and for the southern district of New York, in a proceeding therein pending, an order was entered denying the application of the above-named petitioner for a writ of *habeas corpus*;

54 And the said petitioner having duly obtained an appeal from the said order to the Supreme Court of the United States and filed a copy thereof in the clerk's office of the said circuit court to review the same:

Now, the condition of the above obligation is such that if the said petitioner, Charles F. W. Neely, shall prosecute said appeal to effect and shall answer all costs if he shall fail to make the said appeal good, then the above obligation to be void; else to remain in full force and effect.

(S'g'd) CHARLES F. W. NEELY. [L. S.]

Sealed and delivered in presence of—
(S'g'd) GORDON M. BUCK.

(S'g'd) THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN, *Manager.*

[Seal U. S. Fidelity & Guaranty Company.]

Attest:
(S'g'd) WYLLYS BENEDICT,
Attorney-in-fact.

[5-ct. U. S. documentary stamp.]

55 STATE OF NEW YORK, } ss:
County of New York, }

On this 20th day of August, 1900, before me personally appeared Charles F. W. Neely, to me known and known to me to be the indi-

vidual described in and who executed the foregoing instrument, and acknowledged to me that he executed the same.

(S'g'd) GORDON M. BUCK,
Notary Public, N. Y. Co.

STATE OF NEW YORK, *County of New York,* } ss:

On the 20th day of August, in the year 1900, before me personally came Sylvester J. O'Sullivan, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he was manager of the United States Fidelity and Guaranty Company, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order, and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3 of chapter 720 of the Session Laws of the State of New York for the Year 1893; and the said Sylvester J. O'Sullivan further said that he was acquainted with Wyllys Benedict and knew him to be the attorney-in-fact of said company; that the signature of said Wyllys Benedict subscribed to the within instrument is in the genuine handwriting of said Wyllys Benedict and was subscribed thereto by like order of the board of directors and in the presence of him, the said Sylvester J. O'Sullivan.

(S'g'd) HARRY C. HARDEN,
Notary Public, New York County, 24.

At a regular meeting of the board of directors of the United States Fidelity and Guaranty Company, duly called and held on the second day of May, A. D. 1898, at the office of the company, city of Baltimore, State of Maryland, a quorum being present, on motion it was unanimously—

Resolved, That Andrew Freedman, vice-president, or Sylvester J. O'Sullivan, manager, or Harry C. Harden or Wyllys Benedict, attorneys-in-fact of this company in the State of New York, be, and they hereby are, and each one of them is, authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for or on behalf of the company in its business of guaranteeing the faithfulness of persons holding positions of trust and the performance of contracts other than insurance policies and executing or guaranteeing bonds or undertakings required or permitted in all actions or proceedings at law, such bonds and undertakings, however, to be attested in every instance by one other of the persons above named, as occasion may require.

STATE OF NEW YORK, *County of New York,* } ss:

I, Wyllys Benedict, attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution

with the original thereof as recorded in the minute book of the said company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 20th day of August, 1900.

(S'g'd) WYLLYS BENEDICT,
Attorney-in-fact.

Statement of the United States Fidelity and Guaranty Company at the Close of Business June 30, A. D. 1899.

ASSETS.		LIABILITIES.	
Stocks and bonds (market value)	$1,178,917.08	Capital stock paid in cash.	$1,563,000.00
Loans secured by collaterals	338,681.25	Cash collateral deposit	43,902.93
Cash on hand and in banks.	311,450.90	Surplus and reserve	541,690.73
Loans secured by mortgage	37,275.10		
Real estate	65,346.66		
Advances on real estate secured by deeds	21,249.83		
Furniture and fixtures	100.00		
Agents' balances, less commissions	100,779.02		
Due for subscriptions for the dept. of guaranteed attorneys	15,535.98		
Interest due and accrued	16,257.84		
	$2,085,593.66		$2,085,593.66

STATE OF NEW YORK, *County of New York,* } ss:

Wyllys Benedict, being duly sworn, says that he is the attorney-in-fact of the United States Fidelity and Guaranty Company, and that to the best of his knowledge and belief the foregoing is a true and correct statement of the financial condition of said company as of June 30th, 1899, and that the financial condition of said company is as favorable now as it was when such statement was made.

(S'g'd) WYLLYS BENEDICT.

Subscribed and sworn to before me this 20th day of August, 1900.

[NOTARIAL SEAL.] HARRY C. HARDEN,
Notary Public # 24, *New York County.*

56 [Endorsed:] U. S. Supreme Court. In the matter of the petition of Charles F. W. Neely for a writ of *habeas corpus.* Bond. John D. Lindsay, attorney for petitioner, 31 Nassau street, New York.

(Endorsed:) I hereby approve of the within bond as to form and sufficiency. (S'g'd) Wm. J. Wallace, U. S. circuit judge. U. S. circuit court. Filed Aug. 20, 1900. John A. Shields, clerk.

57 By the Honorable William J. Wallace, one of the judges of the circuit court of the United States, in the second circuit.

To Hon. Henry L. Burnett, United States attorney for the southern district of New York, and to William Henkel, Esquire, United States marshal in and for the southern district of New York, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at the Capitol, in the city of Washington, in the District of Columbia, on the 7th day of September, 1900, pursuant to a petition, allowance, and notice of appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Charles F. W. Neely is the appellant and you, the said marshal, are appellee, to show cause, if any there be, why the final order of the said circuit court in said petition, allowance, and notice of appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand, at the borough of Manhattan, in the city of New York, in the district and circuit above mentioned, this 20th day of August, in the year of our Lord one thousand nine hundred.

(S'g'd) WM. J. WALLACE,
United States Circuit Judge.

JOHN D. LINDSAY,
Attorney for the Petitioner and Appellant, 31 Nassau Street, Manhattan, New York City, N. Y.

58 [Endorsed:] United States circuit court. Charles F. W. Neely, appellant, against William Henkel, appellee. (Copy.) Citation. John D. Lindsay, attorney for appellant, 31 Nassau street, New York.

(Endorsed:) Service of a copy of within citation admitted this 20th day of August, 1900. (S'g'd) William Henkel, U. S. marshal, S. D. N. Y. U. S. circuit court. Filed Aug. 20, 1900. John A. Shields, clerk.

59 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one (1) to fifty-eight (58), inclusive, contain a true and complete transcript of the record and proceedings had in said court, entitled In the matter of the application of Charles F. W. Neely for a writ of *habeas corpus*, as the same remain of record and on file in my office

In testimony whereof I have caused the seal of the said court to

Seal of U. S. Circuit Court, South. Dist. New York.

be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 23rd day of August, in the year of our Lord one thousand nine hundred, and of the Independence of the said United States the one hundred and twenty-fifth.

JOHN A. SHIELDS, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Aug. 23, 1900.]

[Endorsed:] United States circuit court of appeals for the second circuit. *In re* application of Charles F. W. Neely for a writ of *habeas corpus*. Transcript of record from the circuit court of the United States for the southern district of New York.

Endorsed on cover: File No., 17,891. S. New York C. C. U. S. Term No., 406. Charles F. W. Neely, appellant, *vs.* William Henkel, United States marshal in and for the southern district of New York. Filed August 28th, 1900.

30058

Nos. 387 and 406.

Motion to advance.

Office Supreme Court U.S.
FILED
OCT 9 1900
JAMES H. MCKENNEY,
Clerk.

Filed Oct. 9, 1900.

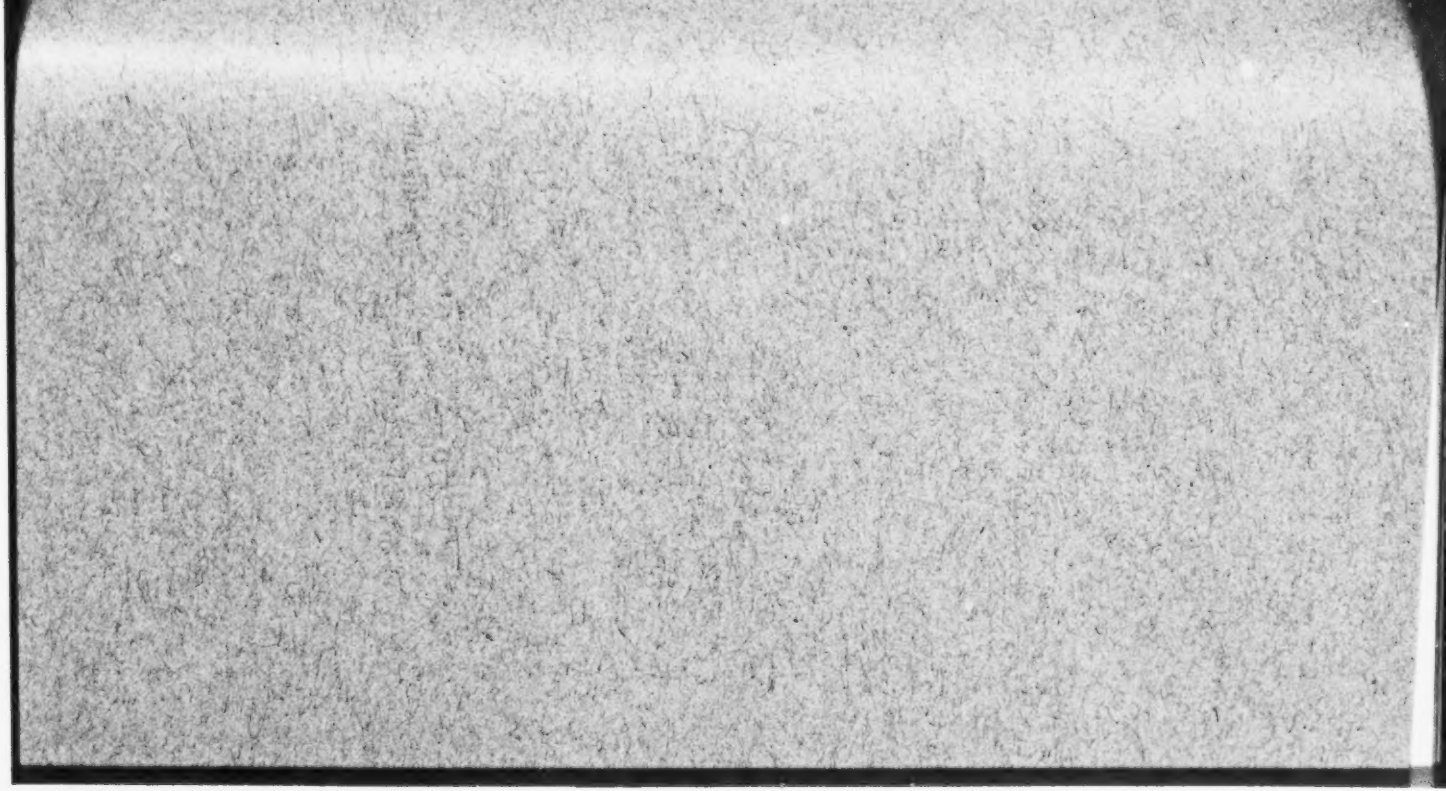
In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES F. W. NEELY, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES marshal for the southern district of New York. } No. 387.

CHARLES F. W. NEELY, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES marshal for the southern district of New York. } No. 406.

MOTIONS TO ADVANCE.



30059

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES F. W. NEELY, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES marshal for the southern district of New York. } No. 387.

CHARLES F. W. NEELY, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES marshal for the southern district of New York. } No. 406.

MOTIONS TO ADVANCE.

The appellant, Neely, while holding the position of finance officer of the department of posts, Cuba, embezzled a large amount of money and fled to this country. While an application for a warrant of extradition under the act of June 6, 1900 (31 Stat., 656), was pending before Judge Lacombe, in New York, and after Judge Lacombe had announced that on an early day he would grant the warrant, Neely applied to Judge Wallace for a

writ of habeas corpus, alleging that he was being held by the United States marshal under the extradition proceedings, and that the act of June 6, 1900, authorizing these proceedings was unconstitutional.

The application in No. 387 was made on August 10, 1900, and that in case No. 406 on August 20, 1900. The second application was made to cure certain supposed defects in the first. In each case Judge Wallace denied the application, but allowed an appeal to this court, and ordered that Neely be remanded to the custody of the marshal, to be held pending the determination of the appeal.

Each appeal is intended to raise the question of the constitutionality of the act of June 6, 1900, authorizing extradition to Cuba, and therefore involves questions of public interest which obviously, in view of the peculiar character of the case, require speedy determination.

JOHN K. RICHARDS,
Solicitor-General.

OCTOBER 9, 1900.

○

SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

No. 1,

CHARLES S. H. DEXTER, APPELLANT,

vs.

WILLIAM TRACEY, UNITED STATES MARSHAL FOR AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANT.

NICOLL, ANABLE & LINDSAY,

Attorneys for the Appellant,

[illegible] Street, Manhattan,

New York, N. Y.

DE LANCEY NICOLL,

JOHN D. LINDSAY,

Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 387.

CHARLES F. W. NEELY, Appellant,

vs.

WILLIAM HENKEL, United States Marshal in and for the Southern District of New York.

BRIEF FOR THE APPELLANT.

Statement.

This is an appeal from a final order of the Circuit Court of the United States in and for the Southern District of New York, entered August 9, 1900, denying the appellant's application for a writ of *habeas corpus*, whereby he sought to obtain his release from the custody of the appellee, who then held and still detains him under certain warrants issued by Hon. E. Henry Lacombe, Circuit Judge in the Second Circuit, in proceedings instituted under the Act of June 6, 1900 (31 Stat., 656), which undertakes to authorize extradition to Cuba.

The Act is as follows:

> "AN ACT AMENDING SECTION FIFTY-TWO HUNDRED AND SEVENTY OF THE REVISED STATUTES OF THE UNITED STATES.
>
> *Be it enacted by the Senate and House of Representatives of the United States of Amer-*

ica, in Congress assembled, That Section Fifty-two Hundred and Seventy of the Revised Statutes of the United States is hereby amended by adding thereto the following proviso:

"*Provided,* that whenever any foreign country or territory, or any part thereof is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of any of the following offenses, namely: Murder and assault with intent to commit murder; counterfeiting or altering money, or uttering or bringing into circulation counterfeit or altered money; counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same; forgery or altering, and uttering what is forged or altered; embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries; larceny or embezzlement of an amount not less than one hundred dollars in value; robbery, burglary, defined to be the breaking and entering by night time into the house of another person with intent to commit a felony therein, and the act of breaking and entering the house or building of another, whether in the day or night time, with the intent to commit a felony therein; the act of entering or of breaking and entering the offices of the Government and public authorities, or the offices of banks, banking-houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein; perjury or the subornation of perjury; rape; arson; piracy by the law of nations; murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government; malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life, and who shall depart or flee, or who has de-

parted or fled, from justice therein to the United States, or to any Territory thereof, or to the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this Title, so far as applicable, shall govern proceedings authorized by this proviso: *Provided further*, that such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged.

And provided further that no return or surrender shall be made of any person charged with the commission of an offense of a political nature.

If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial."

Section 5270 of the Revised Statutes establishes a system for the provisional arrest and commitment of persons subject to extradition under treaties between the United States and other powers, pending the action of the Secretary of State.

The section formerly read as follows:

> "Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any Justice of the Supreme Court, Circuit Judge, District Judge, Commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record, of general jurisdiction of any State, may, upon complaint made under oath, charging

> any person found within the limits of any state, district or territory with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

The intention of the amendatory act was to provide a means for the extradition to Cuba of persons there charged with criminal offenses, so long as Cuba should be "occupied by or under the control of the United States," that is to say, so long as that Island should be governed by the United States.

Its constitutionality is challenged by the appellant upon the ground, broadly stated, that there is no authority in the Constitution for the government by the President, in time of peace, of friendly foreign territory; that as the act is obviously an attempt on the part of Congress to aid and support the President in the maintenance in Cuba of a government unwarranted by the Constitution, and in the administration of which the President assumes to deny to persons accused of crime the ordinary rights and safeguards guaranteed by the Constitution, the appellant's detention is in violation of the Constitution and of his rights, privileges and immunities thereunder.

BRIEF ON THE FACTS.

I.

Of the attitude of the United States towards Spain during the late civil war in Cuba, the incidents which led to our intervention and our relations with the Cuban people subsequent to that event.

While this Court needs no enlightenment as to the causes which led up to the recent war, or the incidents of that war, there are certain features in the relations of our Government to the conflict, illustrative of the attitude in which we were placed by the ultimate intervention of the United States, which may have a bearing upon the legal questions involved in this case. We, therefore, venture to point out some of the more important events preceding the war, the nature and magnitude of the rebellion in Cuba, the existence of which and the incidents resulting from which, occasioned our intervention, and the character and result of our subsequent participation in the conflict; and particularly to invite attention to the relations existing between the Government of the United States and the Cuban people, not alone at the time when, as we shall endeavor to show, their independence was acknowledged by the President, but before then, as well as throughout the ensuing hostilities, down to the present time.

These facts having been considered, we shall present the question, of first importance in this case, as to the legality, under our Constitution, of the establishment and maintenance in Cuba of the rule, to the jurisdiction of which the Act of June 6, 1900, seeks to subject the appellant.

While many facts to which we shall refer do not appear in the printed record, they are all matters of public history of which this Court will take notice. Moreover, they can all be substantiated by reference to the Government archives.

Our object in preliminarily reviewing these historical facts is to demonstrate beyond any question the accuracy of our primary contention, that there never has been any occasion or warrant in public law, or under the Constitution of the United States, for the American occupation or control of the Island of Cuba, since that Island has never been "enemy country," or in any sense "hostile territory," and was never *invaded* or *conquered* by the United States forces. We shall show that by the forcible intervention of the United States in the war between Spain and the Cuban insurgents the United States became the ally of the latter, whose freedom and independence the United States Government had solemnly recognized, and the *fact* of whose absolute freedom and independence the President, by approving the joint resolution of April 20, 1898, and by other executive acts plainly evidencing his intention in that regard, had conclusively established; that the conflict thereafter became, not a war between the United States and Spain, but a joint war between the allied forces of the United States and of the free people of Cuba on the one part, and of Spain on the other; that throughout our troops and our fleets sought and received the assistance and co-operation of the Cuban military forces; that there was systematic, preconcerted, joint action between them at all times, and that when peace was brought about, the victors were the United States and Cuba, not the United States alone.

It will further appear, whatever may be said of the treaty stipulations whereby the war was ended, that Congress has at all times appreciated our true

relations and attitude toward the Cuban people, and has by various acts of positive legislation manifested its recognition of the character of those relations, and, above all, that the Cuban people are and have been a friendly foreign sovereign power at all times since the political branch of our Government determined the fact of their independence.

If we are correct in these assumptions, we shall contend that neither the principles of public law, nor any power conferred upon the President by the Constitution, afford any authority or justification for the rule now maintained in Cuba or for the methods there employed in the administration of criminal justice, and that Congress, in enacting the Act of June 6, 1900, which seeks to subject the appellant to a criminal prosecution under that rule and by those methods, acted without authority under the Constitution.

The facts are as follows:

1. *Of the origin of the late Cuban insurrection, and the direct concern of the United States in the conditions thereby brought about.*

The Cuban insurrection, which began with the uprising of the 24th of February, 1895, was simply a resumption of the revolution of 1868–1878, generally spoken of as the "Ten years' war," which, for a time, was supposed to have been terminated by the illusive peace of Zonjon.

For half a century the attempts of the Cubans to overthrow the sovereignty of Spain over the island, produced serious disturbances in the United States, grave and constant interference with its commerce, and frequent danger of the rupture of friendly relations with Spain. The conditions existing in the island were of vital concern to us. The Cubans were our neighbors, with whom our relations were necessarily intimate and extensive; and

> "they had been engaged in a struggle for independence, with stronger reasons than ex-

isted in our own case when we rebelled against the mother country."

Treaty and Protocols accompanying the message of the President, transmitting the treaty with Spain, Jan. 4, 1899 (55th Cong., 3rd Session, Senate Document No. 62, Part I.), Annex to Protocol No. 15, p. 209.

As early as 1875 President Grant called attention to the horrors of the situation and the consequent injuries to the interests of the United States and other nations, and also to the fact that the agency of others, either by mediation or by intervention, seemed to be the only alternative, which must sooner or later be invoked for the termination of the strife. During that administration, notwithstanding that it was clearly intimated to Spain that the United States could not much longer endure the condition of affairs in Cuba, no unfriendly action was taken, and for ten years it suffered all the inconvenience and deprivation, destruction of trade and injury to its citizens incident to the struggle, which was temporarily quelled by the Peace of Zanjon, only to break out again in 1895 and to be waged

" with every feature of horror and desolation and profitless strife which had characterized the former struggle."

Ibid, Annex to Protocol No. 10, pp. 106–107.

Years before the last outbreak the Cuban people began to organize and prepare for it. The Cuban Revolutionary Party was formed with José Marti as its head. One of its main objects was to promote the sympathy of other countries. The military organization of the movement was completed by the election of Maximo Gomez as commander in chief. His election was the result of the choice of the principal

Cuban officers who had fought in the ten years' war of 1868-1878.

War material and equipments were secured, and the first actual uprising took place, as we have said, on the 24th of February, 1895.* From the very beginning conflicts between the Spanish troops and the Cubans were of daily occurrence.

Statement of facts enclosed with Mr. T. Estrada Palma's letter to the Secretary of State, December 7, 1895, 54th Cong., 1st Sess., Senate Document No. 166; 54th Cong., 2d Sess., Senate Report No. 1160.

2. *The first Cuban Constitution, and the formation of a government under it.*

Early in April José Marti issued a call for the selection of representatives of the different army corps of the Cuban Army of Liberation to form a plan of civil government. His death at Boca de Dos Rois, on the 19th of May, postponed the selection of these men, but in the beginning of September the call was complied with. Delegates from each of the army corps representing the Provinces of Santiago, Puerto Principe, Santa Clara, and the western part of the Island, comprising the Provinces of Matanzas and Havana, were accordingly elected to the Constituent Assembly which was to establish a civil government, republican in form.

A complete list of the members of this Assembly, together with an account of its organization and proceedings, is appended to the statement submitted by Mr. Palma to the Secretary of State.

Ibid, Exhibit B.

* "The resumption of the revolution of 1868–1878 began when the Cubans on February 24, 1895, declared a separation from the Spanish monarchy, and fighting between the Spanish troops and the Cuban forces soon began. By March the Cuban 'Army of Liberation,' as it was called, was said to number 43,000."

The Constituent Assembly met at Jimaguayu, in the Province of Puerto Principe, on the 13th of September, 1895.

The delegates elected Salvador Cisneros Betancourt, president of the Assembly, Rafael Mandulay, vice-president, and four secretaries.

Ibid.

Sessions were held on the 13th, 14th, 15th and 16th of September, at which the Assembly discussed "the Constitution which is to rule the destinies of the Republic."

On the 16th of September the "Constitution of the Provisional Government of Cuba" was adopted and signed by all the representatives,* whereupon the President and other members of the Assembly

> "swore upon their honor to loyally and strictly observe the fundamental code of the Republic of Cuba."
>
> *Ibid.*

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* The Constitution was as follows:

CONSTITUTION OF THE PROVISIONAL GOVERNMENT OF CUBA.

The revolution for the independence and creation in Cuba of a democratic Republic in its new period of war, initiated on February 24th last,[1] solemnly declares the separation of Cuba from the Spanish monarchy, and its constitution as a free and independent State, with its own Government and supreme authority under the name of the Republic of Cuba, and confirms its existence among the political divisions of the world.

The elected representatives of the revolution, in convention assembled, acting in its name and by the delegation which for that purpose has been conferred upon them by the Cubans in arms, and previously declaring before the country the purity of their thoughts, their freedom from violence, anger, or prejudice, and inspired only by the desire of interpreting the popular voice in favor of Cuba, have now formed a compact between Cuba and the world, pledging their honor for the fulfillment of said compact in the following articles of the constitution:

ARTICLE I. The supreme powers of the Republic shall be vested in a government council composed of a president, vice-president, and four secretaries of state, for the dispatch of the business of war, of the interior, foreign affairs, and of the treasury.

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[1] The expression "in its new period of war," means that the Cubans regarded the revolution as a continuous movement from the time of the rising at Yara in 1868. The "first period" was terminated by the so-called "peace of Zanjon." The second started with the uprising at Baire, February 24, 1895. But the Cubans hold that the revolution had not ceased in the interval.

On the 18th of September, the Assembly again met and elected a government council, as follows:

President—SALVADOR CISNEROS BETANCOURT.
Vice-President—BARTOLOME MASO.
Secretary of War—CARLOS ROLOFF.
Secretary of the Treasury—SEVERO PINO.
Secretary of the Interior—Dr. SANTIAGO CONIZARES.
Secretary of Foreign Relations—RAFAEL M. PORTUONDO.
Subsecretary of War—MARIO MENOCAL.
Subsecretary of the Treasury—Dr. JOAQUIN CASTILLO.
Subsecretary of the Interior—CARLOS DUBOIS.
Subsecretary of Foreign Relations—Dr. FERMIN VALDES DOMINGUEZ.

These gentlemen having been installed in office and having entered upon the discharge of their duties, the election of the general-in-chief of the "Army of Liberation," lieutenant general and diplomatic agent followed, with the result that General Gomez and Major-General Antonio Maceo

ART. II. Every secretary shall have a sub-secretary of state, in order to supply any vacancies.

ART. III. The government council shall have the following powers:

1. To dictate all measures relative to the civil and political life of the revolution.

2. To impose and collect taxes, to contract public loans, to issue paper money, to invest the funds collected in the island, from whatever source, and also those which may be raised abroad by loan.

3. To arm vessels, to raise and maintain troops, to declare reprisals with respect to the enemy, and to ratify treaties.

4. To grant authority, when it is deemed convenient, to order the trial by the judicial power of the president or other members of the council, if he be accused.

5. To decide all matters, of whatsoever description, which may be brought before them by any citizen, except those judicial in character.

6. To approve the law of military organization and the ordinances of the army, which may be proposed by the general in chief.

7. To grant military commissions from that of colonel upward, previously hearing and considering the reports of the immediate superior officer and of the general in chief, and to designate the appointment of the latter and of the lieutenant-general in case of the vacancy of either.

8. To order the election of four representatives for each army corps

were respectively chosen to those two principal military offices, while Mr. Palma was selected diplomatic agent.

Ibid.

On the same day the Assembly conferred on Mr. Palma the title of "Delegate Plenipotentiary of the Republic of Cuba."

Ibid.

On the 18th of October, 1895, President Cisneros promulgated certain laws for the civil government of the Republic.

Chapter I. is entitled "Territorial Division" and consists of Articles I. to XI., inclusive.

By Article I. the Republic is declared to comprise:

> "The territory occupied by the Island of Cuba from Cape San Antonio to Point Maisi and the adjacent islands and keys."

By the remaining articles of this chapter the island is divided into four States, the boundaries of which are described, and these are again divided into

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whenever in conformity with this constitution it may be necessary to convene an assembly.

ART. IV. The government council shall intervene in the direction of military operations only when in their judgment it shall be absolutely necessary to do so to realize high political ends.

ART. V. As a requisite for the validity of the decrees of the council, at least two thirds of the members of the same must have taken part in the deliberations of the council, and the decrees must have been voted by the majority of those present.

ART. VI. The office of councilor is incompatible with any other of the Republic, and requires the age of twenty five years.

ART. VII. The executive power is vested in the president, and, in case of disability, in the vice president.

ART. VIII. The resolutions of the government council shall be sanctioned and promulgated by the president, who shall take all necessary steps for their execution within ten days.

ART. IX. The president may enter into treaties with the ratification of the government council.

ART. X. The president shall receive all diplomatic representatives and issue the respective commissions to the public functionaries.

ART. XI. The treaty of peace with Spain, which must necessarily have for its basis the absolute independence of the Island of Cuba, must be

districts, which are in time to be divided in prefectures and subprefectures, &c.

Chapter II. is entitled "of the government and its administration," which by Article XII. is vested in the Department of the Interior. Articles XIII. to XXV. prescribe the methods of its administration.

Ibid.

On the 25th of September a "Law of Civil Marriage" was promulgated.

On the 6th of October provision was made for the organization of a postal service.

On the 18th of October, a law was enacted for the organization of the public treasury.

See also "Instructions to the Officers of the Department of the Treasury of the Republic of Cuba," October 25, 1895, "Extract of the Sessions of the Government Council, Republic of Cuba," ratified by the Secretary, &c.

Ibid.

In September, 1895

> "as we know by official documents printed on the spot, the insurgent government was regularly organized, a constitution adopted,

ratified by the government council and by an assembly of representatives convened expressly for this purpose.

ART. XII. The vice-president shall substitute the president in the case of a vacancy.

ART. XIII. In case of the vacancy in the offices of both president and vice-president on account of resignation, deposition, or death of both, or from any other cause, an assembly of representatives for the election to the vacant offices shall be convened, the senior secretaries in the meanwhile occupying the positions.

ART. XIV. The secretaries shall have voice and vote in the deliberations of resolutions of whatever nature.

ART. XV. The secretaries shall have the right to appoint all the employees of their respective offices.

ART. XVI. The secretaries in cases of vacancy shall substitute the secretaries of state and shall then have voice and vote in the deliberations.

ART. XVII. All the armed forces of the Republic and the direction of the military operations shall be under the control of the general in chief,

a president elected, and in due course various branches of the administration set in motion."

Report from the Senate Committee on Foreign Relations, Dec. 21, 1896, accompanying Senate Joint Resolution No. 163, recognizing the independence of the Republic of Cuba; 54th Congress, 2d Sess., Senate Report No. 1160, p. 24.

It appears that this government continued to perform its functions undisturbed. The Senate Committee in the report referred to said:

"On the military side, as we officially know, they have organized, equipped and maintained in the field, sufficient forces to baffle the exertions of 200,000 Spanish soldiers. On the civil side they have organized their system of administration in every province, for, as we

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who shall have under his orders as second in command a lieutenant-general, who will substitute him in case of vacancy.

ART. XVIII. All public functionaries of whatever class shall aid one another in the execution of the resolutions of the government council.

ART. XIX. All Cubans are bound to serve the revolution with their persons and interests, each one according to his ability.

ART. XX. The plantations and property of whatever description belonging to foreigners are subject to the payment of taxes for the revolution while their respective governments do not recognize the rights of beligerency of Cuba.

ART. XXI. All debts and obligations contracted since the beginning of the present period of war until the promulgation of this constitution by the chiefs of the army corps, for the benefit of the revolution, shall be valid as well as those which henceforth the government council may contract.

ART. XXII. A government council may depose any of its members for cause justifiable in the judgment of two-thirds of the councilors, and shall report to the first assembly convening.

ART. XXIII. The judicial power shall act with entire independence of all the others. Its organization and regulation will be provided for by the government council.

XXXIV. The present constitution shall be in force in Cuba for two years from the date of its promulgation, unless the war for independence shall terminate before. After the expiration of the two years, an assembly of representatives shall be convened, which may modify it, and will proceed to the election of a new government council, and which will pass upon the last council.

Ibid, pp. 87 *et seq.*

know officially, they 'roam at will over at least two-thirds of the inland country.' Diplomatically they have maintained a regularly accredited representative in the United States for the past year, who has never ceased to ask recognition and to offer all possible information."

Ibid.

3. *Extent of the insurrection by the end of* 1895.

In his message to Congress of December 2, 1895, President Cleveland said:

"Cuba is again grossly disturbed. An insurrection, in some respects more active than the last preceding revolt, which continued from 1868 to 1878, now exists in a large part of the eastern interior of the island, menacing even some populations on the coast. Besides deranging the commercial exchanges of the island, of which your country takes the predominant share, this flagrant condition of hostilities, by arousing sentimental sympathy and inciting adventurous support among our people, has entailed earnest effort on the part of this Government to enforce obedience to our neutrality laws and to prevent the territory of the United States from being abused as a vantage ground from which to aid those in arms against Spanish sovereignty. * * * Though neither the warmth of our people's sympathy with the Cuban insurgents nor our loss and material damage consequent upon the futile endeavors thus far made to restore peace and order, nor any shock our humane sensibilities may have received from the cruelties which appear to especially characterize this sanguinary and fiercely conducted war, have in the least shaken the determination of the Government to honestly fulfill every international obligation, yet it is to be earnestly hoped on every ground that the devastation of armed conflict may speedily be stayed, and order and quiet restored to the distracted island, bringing in their train the activity and thrift of peaceful pursuits."

President Cleveland's third annual message.

4. *The Cuban cause is presented to the Secretary of State.*

Mr. Palma, who, as we have seen, had been duly accredited as the diplomatic delegate plenipotentary of the Republic of Cuba, under an appointment by the Constituent Assembly of Cuba, was received informally by the President for the purpose of presenting the case of Cuba to our Government.

On the 7th of December, 1895, he addressed a note to the Secretary of State, accompanied by a statement of facts, in which the case of Cuba was set forth officially. That document was printed by order of the Senate, and was appended to the Senate Report here before referred to.

> "Additional views of Mr. Morgan and Mr. Mills in support of the Report of the Committee," &c., 54th Congress, 2d Session, Senate Report, No. 1160, p. 27.

Mr. Palma's letter was accompanied by several papers which set forth fully the grievances complained of by the Cubans. In its nature it was

> "a declaration of the independence of Cuba, stating the grounds of their united action."
> *Ibid*, pp. 27-28.

These papers narrated the causes of the Cuban revolution, which Mr. Palma said had reached that stage where the issue was "independence or extermination." They reviewed the preliminary organization of the revolt; the uprising; the growth of the revolution; the battles and campaigns that had already been fought, including the victorious campaigns of General Gomez against Captain General Martinez Campos, which had resulted in the recall of the latter to Spain and the appointment of Captain-General Weyler in his place; the military or-

ganization of the Cubans; their civil government; and the general character of the war.

54th Congress, 1st Session, Senate Document No. 166, pp. 1–16; 54th Congress, 2d Session, Senate Report No. 1160, Appendix No. 3, pp. 57–73.

5. *The situation engages the attention of Congress.*

The civil war, like the prior attempts at Cuban independence, entailed upon us heavy burdens. It made it necessary to patrol our coasts, to tax both civil and military resources in order to detect and prevent expeditions from our shores in the interests of the insurgents, and to repress the natural sympathy of our citizens, while as a nation we remained passive witnesses of misery, bloodshed and starvation in a land almost within sight of our borders.

The legislative department, however, was not inactive.

In the early part of 1896, both Houses of Congress expressed the opinion by concurrent resolution that a condition of public war existed in Cuba requiring the recognition of a state of belligerency in that island.

This resolution, which was passed by the Senate on the 28th of February, 1896, proposed that —

> "the friendly offices of the United States should be offered by the President to the Spanish government for the recognition of the independence of Cuba."

The House of Representatives adopted a substitute declaring that

> "Congress, believing that the only permanent solution of the contest, equally in the interest of the people of Cuba and other nations, would be the establishment of a government by the choice of the people of Cuba, it is the sense of Congress that the Government of the United States should use its good offices and friendly influence to that end."

The substitute was accepted by the Senate and agreed to March 2, 1896.

6. *President Cleveland's unsuccessful efforts to bring about peace.*

In accordance with the suggestion of Congress, President Cleveland tendered to Spain the friendly offices of the Government. Then, as was done during the ten years' war (1868–1878), the United States Government testified its grave concern and offered its aid to put an end to bloodshed in Cuba. But any mediation on our part was not accepted.

President McKinley's First Annual Message, Dec. 6, 1897.

President Cleveland, in his Message to Congress of December, 1896, was, however, constrained to say:

> "When the inability of Spain to deal successfully with the insurrection has become manifest, and it is demonstrated that her sovereignty is extinct in Cuba for all purposes of its rightful existence, and when a hopeless struggle for its reestablishment has degenerated into a strife which means nothing more than the useless sacrifice of human life and the utter destruction of the very subject matter of the conflict, a situation will be presented in which our obligations to the sovereignty of Spain will be superseded by higher obligations, which we can hardly hesitate to recognize and discharge."

7. *Further agitation of the subject in Congress.*

On the 21st of December, 1896, the Senate Committee on Foreign Relations reported a joint resolution as follows:

> "*Resolved* * * *, That the independence of the Republic of Cuba be, and the same is hereby, acknowledged by the United States of America.
>
> *Be it further resolved*, That the United States will use its friendly offices with the

Government of Spain to bring to a close the war between Spain and the Republic of Cuba."

Report of Senator Cameron from the Committee on Foreign Relations, &c., Dec. 21, 1896; 54th Congress, 2d Session, Senate Report No. 1160, p. 25.

In its report the committee, after reviewing at length the condition of affairs in Cuba, and expressing its opinion that the insurgents had an established government of their own and possessed all the powers and incidents of sovereignty entitling them to take and maintain their place among the sovereign powers of the world, said:

"There is no reason to suppose that any portion of the Cuban people would be dissatisfied by our recognizing their representative in this country or that they disagree in the earnest wish for that recognition. The same thing could hardly be said of all the countries recognized by Monroe in 1822. Greece had no such stability when it was recognized by England, Russia and France. Belgium had nothing of the sort when she was recognized by all the powers in 1830. Of the states recognized by the treaty of Berlin in 1878, we need hardly say more than that they were the creatures of intervention."

Ibid, p. 24.

8. *The second Cuban constitution.*

Meanwhile and throughout the ensuing year the revolution in Cuba continued unabated. The Cuban army maintained its strength, and the revolutionary government still asserted itself in spite of the fearful odds arrayed against it.

On the 29th of October, 1897,

"the representatives of the Cuban people, freely meeting in constituent assembly (at La

> Yaya), convoked by virtue of the mandate contained in the constitution of the 16th of September, 1895,"

adopted a second constitution.

This "Constitution of the Republic of Cuba, and brief sketches of the President of the Republic and his Cabinet," was presented to the United States Senate on the 9th of February, 1892, by Senator Cannon, and was printed by order of the Senate.

> "Constitution of the Republic of Cuba," 55th Congress, 2d Session, Senate Document No. 129.

In the preamble the delegates to the convention ratified their "firm and unshakable resolve of obtaining the absolute and immediate independence of the island, in order to establish in it a democratic republic," and "inspiring" themselves "in the present necessities of the revolution," decreed the constitution which followed.

Title I. (Arts. 1–3, inclusive), treats "of the territory and of citizenship."

Article 1 declares that the "Republic of Cuba will embrace all the territory occupied by the Island of Cuba and the adjacent islands and keys."

Title II. (Arts. 4–14, inclusive), treats "of industrial and political rights."

Article 4 is as follows:

> "No one shall be arrested, indicted or suffer sentence, but on account of acts punished in laws previous to the execution of the acts and in the manner provided by the said laws."

Title III. treats "*of the Government of the Republic.*" This article is divided into five sections, entitled "of the public powers" (Arts. 15–17), "of the Government Council" (Arts. 18–26), "of the President and Vice-President of the Republic" (Arts. 27–29), "of the Secretaries of State" (Arts. 30–35),

and "of the Secretary of the Government Council" (Arts. 36 37), respectfully.*

Title 4 (Arts. 38–45, inclusive) is entitled "of the Assembly of Representatives."

By Article 38, it is provided that

> "the assembly of representatives shall assemble two years after this law is promulgated,† and shall have power to make a new constitution or to modify this one, to censure the acts of the Government, and to provide for all the securities of the Republic. The Government Council with due anticipation and under the strictest responsibility, shall adopt the opportune measures, so that this constitutional provision shall be complied with."

Article 40 provided:

> "If the Government, in conformity with excerpt 15 of * * * Article 22, shall make peace with Spain, the Government shall call the assembly that must ratify the treaty.

* This title is as follows:

TITLE III.—OF THE GOVERNMENT OF THE REPUBLIC.

SECTION 1. *Of the public powers.*

ARTICLE 15. The executive power is vested in a Government Council which will have the faculty of dictating laws and provisions of a general character, in accordance with this constitution.

ARTICLE 16. The administration of justice in reference to crimes belongs to the war jurisdiction and will be exercised in the manner determined by the laws.

ARTICLE 17. The administration of justice in reference to civil matters belongs to the civil authorities and its procedure shall be regulated by a law.

SECTION 2.—*Of the Government Council.*

ARTICLE 18. The Government Council is composed of a president, vice-president, and four secretaries of state, for the dispatch of the affairs of war, treasury, foreign, and interior. All the members of the council have voice and vote in its deliberations.

ARTICLE 19. To be president or vice-president, it is required to be a native Cuban, or a Cuban citizen with more than ten years of service to

† When the time arrived for the meeting of the Assembly of Representatives (in the fall of 1899) the island of Cuba was occupied by the American forces, and the President was governing the entire island by martial law.

> This assembly shall temporarily provide for the government and administration of the Republic until the definite constituent assembly shall meet."

Article 41 was as follows:

> "If Spain, without any previous agreement, with the Government Council, evacuates all the territory, an assembly shall be convoked which will have the same powers specified in the second paragraph of the previous article. It being understood that this case shall have arrived when the Cuban armies shall occupy permanently all the territory of the island, even if the enemy retain in its power some fortresses."

Title V. (Arts. 46–48) was entitled "General Provisions."

By Article 46 the Republic guarantees only the debts recognized by the Constitution of 1895 and

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the cause of the independence of Cuba, and to be of the age of 30 years; to be secretary of state, the age of 25 years.

ARTICLE 20. The Government Council shall appoint its secretary, whom it can freely remove.

ARTICLE 21. Each secretary of state shall have a subsecretary, who will substitute the secretary in cases of vacancy, absence, or illness, and who will discharge any commissions intrusted to him by the Government Council.

ARTICLE 22. Besides the powers conferred upon it by other articles of this constitution, the Government Council has the following:

1. To make all laws and regulations regarding the revolution and the military, civil, and political life of the Cuban people.

2. To resolve the petitions addressed to it, ordering those which are not properly transmitted to take their due course.

3. To depose, for just cause and under its responsibility, any councilor or subsecretary. This resolution shall be reported to the first assembly and can only be passed by the affirmative votes of four councilors.

4. To appoint secretary and subsecretary for the transacting of business in any department, when both positions shall have been vacant for two months.

5. To appoint and remove public functionaries of all classes in the manner provided by law, ordering that they shall be submitted to the courts of justice in the proper cases.

6. To determine the policy of the war and the general lines of the campaign, and to intervene, when, in their judgment, there be founded

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those which may afterwards have been or are legitimately contracted.

By Article 47 foreigners were precluded from claiming indemnity for damage caused by the Cuban forces

> "previously to the date on which their respective Governments recognize the belligerancy or independence of Cuba."

Article 48 provided that the Constitution should

> "be in force until another one shall revoke it."

An "Additional and temporary article of the constitution" provides: First, For revision of the penal laws; Second, For a modification of the laws of procedure, so that (1) it shall be more simple and

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motive for it, in the military operations, always by means of the generals of the nation.

7. To raise troops, to declare reprisals, and to grant letters of marque.

8. To grant military ranks from sub-lieutenant to major-general, in the form established by the law of military organizations.

9. To issue paper money, to coin money, fixing its kind and value.

10. To contract loans, determining when they shall become due, the interests, discounts, commissions, and guarantees, and to make all negotiations advised by the public weal, being strictly responsible for the use it shall make of these faculties and of those provided in the previous article.

11. To levy taxes, to decree the investment of the public funds, and to ask and approve the accounts of the same.

12. To determine the foreign policy and to appoint and remove agents, representatives and delegates of all classes.

13. To grant passports.

14. To issue the safe conducts necessary for the discharge of the functions of the Government.

15. To make treaties with other powers, choosing the commissioners who are to celebrate them; but without being able to delegate in them its final approval. The one of peace with Spain must be ratified by the Assembly, and cannot be initiated but on the basis of the absolute and immediate independence of all the Island of Cuba.

ARTICLE 23. The powers which this law grants to the Government Council or to any of its members can not be delegated.

ARTICLE 24. All the resolutions of the council must be passed by absolute majority. At least four councilors must be in attendance, among them the secretary of the department to which the resolution belongs.

ARTICLE 25. The councilors can not exercise or be appointed to any

applicable, (2) to assure the independence of the courts, (3) to provide for appeals to higher courts, and (4) to make judicial responsibility effective; Third, For a law of military organization, and other matters relating to the regulations affecting the Cuban forces.

On the same day (October 29, 1897) a new Government Council was constituted as follows:

President.—Maj.-Gen. Bartolome Maso.
Vice-President.—Brig. Domingo Mendez.
Secretary of War.—Brig. Jose B. Aleman.
Secretary of the Treasury.—Col. Ernesto Fonts Stirling.
Secretary of the Interior.—Dr. Manuel R. Silva.
Secretary of Foreign Relations.—Col Andres Moreno de la Torre.

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other office while they discharge their functions, excepting that of representative in the assembly, which shall ratify the treaty of peace with Spain.

Article 26. The councilors shall not be indicted without being previously authorized by the Government, nor arrested except in case of *flagrante delicto*. The subsecretaries, when carrying out an express and definite commission of the Government, shall enjoy the same prerogative.

Section 3.—*Of the President and Vice-President of the Republic.*

Article 27. The President of the Republic is the president of the Government Council, and in his representative character he is the superior in rank to all the functionaries.

Article 28. His powers are:

1. To represent the Republic in its official acts and relations.

2. To authorize with his signature the documents addressed to foreign functionaries of equal rank.

3. To sign the proclamations and manifestoes agreed upon by the Government Council.

4. To countersign the dispatches and certificates issued by the secretaries of state and by that of the council.

5. To authorize in the name of the Government Council the diplomas and appointments made by it.

Article 29. The Vice-President will take part with voice and vote in all the sessions of the council and will substitute the President with all his faculties, in case of vacancy, absence, or illness.

Section 4.—*Of the secretaries of state.*

Article 30. The secretaries of state shall have as exclusive faculties the transaction of all business of their departments, and will be the

Sub-Secretary of War.—COL. RAFAEL DE CÁRDENAS.
Sub-Secretary of the Treasury.—LIEUT. COL. SATURNIUS LASTRA.
Sub-Secretary of the Interior.—MAJ. PEDRO AGUILERS KINDELAN.
Sub-Secretary of Foreign Relations.—COL. NICOLAS ALBERDI.
Ibid., pp. 6, 7.

The Government Council thereupon re appointed General Gomez as General-in-Chief of the army, and appointed Major-Gen. Calixto Garcia as Lieutenant-General in place of Gen. Maceo, who had fallen in battle.

Ibid., p. 7.

9. *The United States continues its efforts to put an end to the war.*

Just prior to this time our Minister in Spain had been directed by the President to impress upon the Spanish Government

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superior heads of all the functionaries and employees of their departments, who will be proposed by them, according to the law, when the Government Council is to appoint them.

ARTICLE 31. The secretary of war will be the superior chief in rank of the army of liberty.

ARTICLE 32. The administrative service of the army depends on the secretary of war, as shall be regulated by the law of military organization.

ARTICLE 33. The secretary of the treasury will be the custodian of the national funds, and matters in relation to the public debt and accounts shall be under his care.

ARTICLE 34. The secretary of foreign affairs is the superior and immediate chief of all the agents, representatives, and delegates abroad.

ARTICLE 35. The secretary of the interior shall have charge of matters of civil character and is the superior chief of the authorities and employees of his department.

SECTION 5.—*Of the secretary of the Government Council.*

ARTICLE 36. The secretary of the council will be present, without voice or vote, at all the sessions of the Government Council; he will draw its minutes, authorizing them with his signature, after having been approved and signed by all the councilors who have been present at the meeting.

ARTICLE 37. He will issue, in conformity with the archives, the certificates which may be ordered by the President or by the Government Council.

> "the sincere wish of the United States to lend its aid toward the ending of the war by reaching a peaceful and lasting result, just and honorable alike to Spain and to the Cuban people. * * * All that was asked or expected was that some safe way ought be speedily provided and permanent peace restored."
>
> President McKinley's First Annual Message, Dec. 6, 1897.

The reply of the Spanish Government was received on the 23d day of October. It was in the direction of a better understanding. It admitted our deep concern in the war in Cuba, and the justice of our desires. It declared that the present Spanish Government was bound by every consideration to a change of policy that should satisfy the United States and pacify Cuba within a reasonable time. In this connection President McKinley said:

> "Decrees in application of the foreshadowed reforms have already been promulgated. * * * It is honestly due to Spain and to our friendly relations with Spain that she should be given a reasonable chance to realize her expectations and to prove the asserted efficacy of the new order of things to which she stands irrevocably committed. * * * The near future will demonstrate whether the indispensable condition of a peace, just alike to the Cubans and to Spain, as well as equitable to all our interests so intimately involved in the welfare of Cuba, is likely to be attained. If not, the exigency of further and other action by the United States will remain to be taken. When that time comes, that action will be determined in the light of the obligation this Government owes to herself, to the people who have confided to it the protection of their interests and honor, and to humanity. * * * If it shall hereafter appear to be a duty imposed by our obligations to ourselves, to civilization and to humanity to intervene with force, it shall be

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without fault on our part and only because the necessity for such action will be so clear as to command the support and approval of the civilized world."

10. *The destruction of the Maine*, and the *events which followed.*

On the 25th of January, 1898, the Spanish Government having been advised of the purpose of this Government to resume friendly naval visits at Cuban ports, which had been interrupted during this period, the United States battleship *Maine* entered the port of Havana, where she remained until the 15th of February, when she was destroyed by the explosion of a submarine mine. In the catastrophe two officers and two hundred and sixty-four of her crew perished.

This calamity created intense excitement and indignation throughout the United States, the popular belief being that the Spanish authorities were directly or indirectly responsible for it.

President McKinley's message of March 28, 1898.

On the 8th of March, 1898, Congress passed an act appropriating $50,000,000 for the national defense, and giving the President discretionary power in its use.

30 Stat., 274.

On the 27th of March, 1898, the President submitted through Minister Woodford propositions to the Spanish Government looking to an armistice until October 1st for the negotiation of peace with the good offices of the President. The reply of the Spanish cabinet offered as the means to bring about peace in Cuba, to confide the preparation thereof to the insular parliament, inasmuch as the concurrence of that body would be necessary to reach a final result.

Meanwhile, on the 28th of March, the President submitted to Congress the conclusions of the Court of Inquiry organized to inquire into the cause of the destruction of the *Maine*.

These conclusions were:

> "That the loss of the *Maine* was not in any regard due to fault or negligence on the part of any of the officers or members of her crew.
>
> That the ship was destroyed by the explosion of a submarine mine, which caused the partial explosion of two or more of her forward magazines; and
>
> That no evidence has been obtainable fixing the responsibility for the destruction of the *Maine* upon any person or persons.
>
> President McKinley's message of March 28, 1898.

11. *Recognition of Cuban independence.*

The following day a resolution was introduced in the Senate recognizing the independence of Cuba.

Various other resolutions contemplating the intervention of the United States in the Cuban war, were introduced in both Houses of Congress between that time and April 11th. Among them were the following:

> JOINT RESOLUTION No. 2, authorizing and requesting the President to issue a proclamation recognizing the political independence of the Republic of Cuba.
>
> SENATE RESOLUTION No. 40, instructing the Committee on Foreign Relations to inquire what obligations the United States have assumed toward the people of Cuba by asserting and maintaining the right to prevent the acquisition of that island by any European power and compelling its people to remain subject to the dominion of Spain.
>
> SENATE RESOLUTION No. 185, that it is the sense of the Senate that Congress should, with all due and convenient speed, acknowl-

edge by appropriate act the political independence of the Republic of Cuba.

JOINT RESOLUTION No. 132, recognizing the independence of the Republic of Cuba, and for other purposes.

JOINT RESOLUTION No. 133, recognizing the independence of the Republic of Cuba and declaring war against the Kingdom of Spain.

JOINT RESOLUTION No. 134, recognizing the independence of the Republic of Cuba, and providing for intervention by the United States.

JOINT RESOLUTION No. 135, directing and empowering the President, in his discretion, to terminate, by intervention, the hostilities between Spain and the people of Cuba, and in favor of the independence of said people.

JOINT RESOLUTION No. 142, for the recognition of the independence of the Republic of Cuba.

JOINT RESOLUTION No. 145, authorizing the President to take such steps as are necessary to put an end to hostilities in Cuba, and to establish a republican form of government on that Island.

On the 11th of April the President addressed a message to Congress in which he asked for authority—

> "to take measures to secure a full and final termination of hostilities between the Government of Spain and the people of Cuba, and to secure in the island the establishment of a stable government, capable of maintaining order and observing its international obligations, insuring peace and tranquility and the security of its citizens as well as our own, and to use the military and naval forces of the United States as may be necessary for those purposes."

The resolutions above enumerated and the President's messages of March 28 and April 11, 1898, were referred to the Senate Committee on Foreign Relations on the 13th of April. That committee submitted a report in which it recommended the adoption of a joint resolution in the exact language

of the resolution as passed (see *post*, pp. 32-33), except that the first paragraph was as follows:

> "That the people of the Island of Cuba are, and of right ought to be, free and independent, and that the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful government of the Island."
>
> 55th Cong., 2nd Sess., Senate Report No. 885.

In its report the Committee said:

> "Upon due consideration of all of the relevant facts of the relations of this Government with Spain, including the destruction of the *Maine*, and of the history of the rebellion, it is the opinion of your committee that the United States ought at once to recognize the independence of the people of Cuba, and also ought to intervene to the end that the war and its unexampled atrocities shall cease, and that such independence shall become a settled political fact at the earliest possible moment, by the establishment by the free action of the people of Cuba when such action can be had, of a government independent in fact and form.
>
> It is believed that recognition of the belligerency of the insurgents in Cuba, if it had been given seasonably, when it was suggested by concurrent resolutions to that effect passed by Congress, would have insured the speedy termination of the war without involving the United States in the contest. Such recognition was not given, and conditions have changed so materially since it was thus passed that, if given now, it would fall far short of supplying the just requirements of the present situation in the light solely of the interests of the United States.
>
> The recognition of the independence of the people of Cuba is justified and demanded by the highest considerations of duty, right and policy.
>
> The insurgents hold the eastern portion of the island, to the practical exclusion of Spain.

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This possession extends over one body of territory comprising fully one half of the area of Cuba.

The extermination by Spain of the peaceful inhabitants of the western portion of the island has so affected the balance of population between these moieties of Cuba that the insurgents comprise in the eastern half nearly one-third of the population of the island. That third of the population pays taxes to them, serves in their armies and in every way supports and is loyal to them. This situation has existed ever since the first few months of the war. The armies of Spain under Campos, Weyler and Blanco, successively, have been repelled in every invasion that they have attempted of the eastern half of the island.

The cause of Spain has continually grown weaker and that of the insurgents has grown stronger. The former is making no substantial effort for the recovery of these lost provinces. Their people are secure from invasion and cruel administration. Spain has never been able to subject them to her unprecedented and murderous policy of concentration and extermination. Her armies have been more than decimated in the attempt to subdue them. Two hundred thousand of her soldiers have failed to reduce the insurgents. The few reinforcements that she is now sending to Cuba do not supply a tithe of her losses caused by battle and disease.

Her control over the western portion of the island is dominance over a desolation which she herself has created. Even there she controls only the territory occupied by her cantonments and camps. Outside these the insurgents are everywhere in presence.

In the population of Cuba the native born preponderate in a very large proportion, probably of eight to one. We have been assured by the most unimpeachable authority (we mean Senators Proctor, Gallinger, Thurston and Money), that the native born Cubans everywhere, even within the military lines of Spain, are opposed to the parent State, and are in sympathy with the insurgents.

> We have also been assured by the same authority that the native Cubans, by superiority in education, are better qualified than the Spaniards, and are thoroughly capable to administer the government of the island.
>
> The preceding observations have assumed a certain control and sovereignty by Spain over the western portion of Cuba. We have indicated its character. It is limited to scattered and fortified areas, and it is not a civil sovereignty. It is merely a military occupation of fortified places."
>
> *Ibid.*, pp. VII.-IX.

The House of Representatives had on the same day (April 13th) passed a resolution authorizing and directing the President to intervene at once to stop the war in Cuba, with the purpose of securing peace and order there, and establishing, by the free action of the people thereof, a stable and independent government of their own, and empowering him to use the land and naval forces to execute that purpose.

On the 18th of April the Senate amended the House resolution, by substituting in its place the one that day reported by the Senate Committee on Foreign relations.

On the 19th of April, after prolonged conferences the Senate and the House of Representatives adopted the joint resolution as amended by the Senate, omitting from the first section the words "and that the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful government of that island."

The resolution as adopted, and as approved by the President the following day (April 20, 1898), read as follows:

> "JOINT RESOLUTION for the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the Island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and di-

recting the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect.

Resolved, By THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED:

First.—That the people of the Island of Cuba are, and of right ought to be, free and independent.

Second.—That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government of the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

Third.—That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

Fourth.—That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people."

12. *Diplomatic relations between the United States and Spain severed.*

The President having communicated to the Spanish Minister in Washington the demand which it became his duty to address to the Spanish Government in obedience to the joint resolution, the Minister asked for his passports and withdrew. The United States Minister at Madrid was in turn notified by the Spanish Minister for Foreign Affairs that the withdrawal of the Spanish representative from the United States had terminated diplomatic relations between the two countries, and that all official

communications between their respective representatives ceased therewith.

President McKinley's message of April 25, 1898.

It appeared from the note addressed to the United States Minister at Madrid by the Spanish Minister for Foreign Affairs on the 21st of April, 1898, that the Spanish Government regarded the demands of the United States Government as measures of hostility. Hence followed the immediate and complete severance of diplomatic relations—

> " which by the usage of nations accompanies an existent state of war between sovereign powers."
>
> *Ibid.*

13. *The United States becomes a party to the war.*

On the 22d of April, 1898, the President proclaimed a blockade of certain ports of the north coast of Cuba, then occupied by the Spanish forces.

30 Stat., 1769.

On the same day Congress passed the Act (Chap. 187) entitled "An Act to provide for temporarily increasing the military establishment of the United States in time of war, and for other purposes."

30 Stat., 361.

On the 23d of April the President, under the authority of this Act, issued a proclamation calling forth volunteers in order to carry the joint resolution into effect.

30 Stat., 1770.

On the same day a decree was issued by the Spanish Government declaring that—

> "The state of war existing between Spain and the United States terminates the treaty of peace and friendship of the 27th October, 1795;

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the protocol of the 12th of January, 1877, and all other agreements, compacts and conventions that have been in force up to the present between the two countries."

Proclamation and decrees during the war with Spain, Washington, Government Printing Office, 1899.

On the 25th of April Congress passed the act (Chap. 189), entitled:

"AN ACT DECLARING THAT WAR EXISTS BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM OF SPAIN."

This act was as follows:

"First, That war be, and the same is, hereby declared to exist, and that war has existed since the 21st day of April, 1898, including said day, between the United States of America and the Kingdom of Spain.

Second, That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States; and to call into the actual service of the United States, the militia of the several States, to such extent as may be necessary to carry this act into effect."

30 Stat., 364.

On the 26th of April Congress passed an act for the reorganization of the line of the army.

Ibid.

On the 25th of May the President called for additional volunteers.

30 Stat., 1772.

14. *Of the principal events of the war, and the cessation of hostilities.*

It is matter of public history that at the beginning of the war many of the Cuban ports were in the possession and control of the Spanish military forces.

The United States sent its fleets and armies to the Island, joined forces with the Cubans, waged battle against the common enemy and continued the struggle with such success, that before the end of July the Spanish Government made overtures of peace, resulting in the protocol of August 12th.

The first encounter of the war occurred on the 27th of April, when a detachment of the blockading squadron shelled the harbor forts and works in construction at Mantanzas.

On the 1st of May the Pacific fleet entered Manila Bay and destroyed a formidable Spanish fleet, consisting of ten war ships and a transport, besides capturing the naval station and forts at Cavite.

A number of minor naval demonstrations followed on the coasts of Cuba and Porto Rico.

On the 10th of June several hundred marines were landed at Guantanamo Bay. By June 20th additional forces were landed. On June 22d the advance of the army under Major General Shafter landed at Darquiri, about fifteen miles east of Santiago. The following day a movement against Santiago was begun. On the 24th an engagement took place, but by nightfall the army was within five miles of Santiago. On July 1st the United States forces gained the outworks of Santiago, and on the 2d El Caney and San Juan were taken, and the investment of the city was completed.

The navy co operated by shelling the town and the coast forts. On the 3d the Spanish fleet, attempting to leave the harbor, was met by the American squadron and completely destroyed.

The capitulation of Santiago followed. After a truce to allow of the removal of non-combatants, negotations continued from July 3d to July 15th, when the preliminaries of surrender were agreed upon. The capitulation embraced the entire eastern end of Cuba.

President McKinley's Second Annual Messages, Dec. 5, 1898.

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35. *Concert of action between the American and Cuban forces.*

"A short time before the commencement of the war there left Washington, from the Bureau of Military Information, two officers, Lieut. A. S. Rowan and Lieut. H. H. Whitney, to attempt the most difficult and dangerous enterprise of ascertaining existing conditions in the Islands of Cuba and Porto Rico, respectively. These efforts were eminently successful. * * * Lieutenant Rowan left the United States on April 9th and landed April 24th at El Portillo, about 70 miles west of Santiago de Cuba. He went into the interior, met General Garcia of the Cuban army, and remained with him for a short time, then together with Brig.-Gen. Enrique Callazo and Lieut.-Col. Carlos Hernandez, of General Garcia's staff, passed up to Manati on the north coast, and on May 4th went in an open boat to Nassau, New Providence, returning to the United States, May 13, 1898."

Report of the Major-General Commanding the Army, Nov. 5, 1898. Report of the Secretary of War, 1898, pp. 24-25.

"As soon as hostilities were commenced expeditions were immediately organized to give aid and support to the Cubans in the way of supplying them with arms, ammunitions of war and supplies, whenever and wherever possible. The first expedition with arms and supplies for the Cubans was started from Key West under the direction of Col. R. H. Hall, Fourth Infantry. * * * Also, a strong expedition was organized, consisting of 5,000 men, under the command of the senior officer then at Tampa, Maj. Gen. W. R. Shafter, the objective point being Tunas, on the south side of Cuba, where it was expected to open communication with the forces under General Gomez and support and co-operate with him in that mountain region (which is a healthful part of Cuba), and also to furnish all the supplies needed by that force. This expedition,

when fully prepared, was delayed on account of the movement of Admiral Cervera's fleet from Cape Verde Islands to the waters of the West Indies, and the movement of our troops was suspended awaiting the result of the expected conflict between that fleet and our own.

An important expedition, under Lieut. Col. Dorst, U. S. V., sailed from Key West to the north of Nassau, New Providence; thence directly south, landing at the harbor of Banes, on the north coast of Cuba, which has been held during the war by the Cubans, where he remained five days, landing a steamer load of the munitions of war most needed, including 7,500 rifles, 1,000,000 cartridges, 5,000 uniforms, and other material needed by the 10,000 Cubans under General Garcia."

Ibid.

On the 24th of June, Major-General Miles submitted a plan of campaign wherein, after outlining a series of military movements, he said:

"This army corps would also have the assistance of all the available forces of Garcia and Gomez, and would by that time be occupying practically two-thirds of the Island of Cuba."

Ibid., pp. 27-28.

"During this time Lieutenant Rowan had returned from his journey to Cuba, bringing with him to Washington Brigadier-General Collazo and Lieutenant-Colonel Hernandez, of General Garcia's staff. He also brought very important information concerning the active operations of the Cubans against the Spanish troops, and the location and strength of the Spanish forces in the eastern part of Cuba, numbering at that time some 31,000 men. The two Cuban officers mentioned accompanied me to Tampa, and Colonel Hernandez, having received permission from the Navy Department to be conveyed by a United States vessel to the harbor of Banes, carried the following letter from me to General Garcia:

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'Headquarters of the Army,
In the Field, Tampa, Fla., June 2, 1898.

Dear General: I am very glad to have received your officers, General Enrique Collazo and Lieut. Col. Carlos Hernandez, the latter of whom returns to-night with our best wishes for your success.

It would be a very great assistance if you could have as large a force as possible in the vicinity of the harbor of Santiago de Cuba, and communicate any information, by signals, which Colonel Hernandez will explain to you, either to our navy or to our army on its arrival, which we hope will be before many days.

It would also assist us very much if you could drive in and harass any Spanish troops near or in Santiago de Cuba, threatening or attacking them at all points, and preventing, by every means, any possible reinforcement coming to that garrison. While this is being done, and before the arrival of our army, if you can seize and hold any commanding position to the east or west of Santiago de Cuba, or both, that would be advantageous for the use of our artillery, it will be exceedingly gratifying to us.

With great respect and best wishes, I remain, very respectfully,

Nelson A. Miles,
Major-General, Commanding United States Army.
Lieutenant-General Garcia, Cuban Army.'

"This letter was sent in anticipation of the movement of the command under General Shafter, which sailed twelve days later. Colonel Hernandez left Key West with it June 2; General Garcia received it June 6, and I received his reply by cable June 9, of which the following is a copy:

'Mole St. Nicholas (via Washington), June 9, 1898.

General Miles,
Commanding United States Army.

Garcia's reply on June 6 to your letter of June 2.

'Will take measures at once to carry out your recommendation, but concentration of force will require some time. Roads bad and Cubans scattered. Will march without delay. Santiago de Cuba well fortified with advanced intrenchments, but believe good artillery position can be taken. Spanish force approximate 12,000 between Santiago de Cuba and Guantanamo, 3,000 militia. Will maintain a Cuban force near Holguin to prevent sending re-enforcements to Santiago.'

The above given to me by Admiral Sampson to forward to you.

Allen.'

"Also the following is an extract from a cablegram from Admiral Sampson to the Secretary of the Navy, which was repeated to me at Tampa, June 12th, for my information:

'Mole St. Nicholas, Haiti.

'General Miles' letter received through Colonel Hernandez on June 6th. Garcia regards his wishes and suggestions as orders, and immediately will take measures to concentrate forces at the points indicated, but he is unable to do so as early as desired on

account of his expedition to Banes Port, Cuba, but he will march without delay. All of his subordinates are ordered to assist to disembark the United States troops and to place themselves under orders. Santiago de Cuba well fortified with advanced intrenchments, but he believes position for artillery can be taken as Miles desires. Approximate, twelve thousand (12,000) regulars and three thousand (3,000) militia between Santiago and Guantanamo. He has sent force in order to prevent aid going to Santiago from Holguin. Repeats every assurance of good-will, and desires to second plans.

'SAMPSON.'

"It will be observed that General Garcia regarded my requests as his orders, and promptly took steps to execute the plan of operations. He sent 3,000 men to check any movement of the 12,000 Spaniards stationed at Holguin. A portion of this latter force started to the relief of the garrison at Santiago, but was successfully checked and turned back by the Cuban forces under General Feria. General Garcia also sent 2,000 men under Perez to oppose the 6,000 Spaniards at Guantanamo, and they were successful in their object. He also sent 1,000 men under General Rios against the 6,000 at Manzanillo. Of this garrison, 3,500 started to reenforce the garrison at Santiago, and were engaged in no less than thirty combats with the Cubans on their way before reaching Santiago, and would have been stopped had General Garcia's request of June 27 been granted. With an additional force of 5,000 men General Garcia besieged the garrison of Santiago, taking up a strong position on the west side and in close proximity to the harbor, and he afterwards received General Shafter and Admiral Sampson at his camp near that place. He had troops in the rear, as well as on both sides of the garrison at Santiago before the arrival of our troops."

Ibid., pp. 29-30.

"General Toral stated that he would surrender all the troops in the department of Santoago de Cuba, many of them from 70 to 100 miles distant and against whom not a shot had been fired; yet the activity of the Cuban troops and their dispositions had been such as to render the Spanish positions exceedingly perilous."

Ibid., p. 35.

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The following extracts are quoted from the report of Maj.-Gen. Shafter:

"On the morning of June 20 we arrived off Guantanamo Bay, and about noon reached the vicinity of Santiago, where Admiral Sampson came on board my headquarter transport. It was arranged between us to visit in the afternoon the Cuban general, Garcia, at Asserraderos, about 18 miles to the west of the Morro. During the interview General Garcia offered the services of his troops, comprising about 4,000 men, in the vicinity of Aserraderos, and about 500 under General Castillo at the little town of Cujababo, a few miles east of Daiquiri. I accepted his offer, impressing it upon him that I could exercise no military control over him except such as he would concede, and as long as he served under me I would furnish him rations and ammunition.

Ever since the receipt of my order I had made a study of the terrain surrounding Santiago, gathering information mainly from former residents of the city, several of whom were on the transports with me. At this interview all the possible points of attack were for the last time carefully weighed, and then, for the information and guidance of Admiral Sampson and General Garcia, I outlined the plan of campaign, which was as follows:

With the assistance of the small boats of the navy, the disembarkation was to commence on the morning of the 22d at Daiquri. On the 21st 500 insurgent troops were to be transferred from Aserraderos to Cujababo, increasing the force already there to 1,000 men. This force under General Castillo was to attack the Spanish force at Daiquiri in the rear at the time of disembarkation. This movement was successfully made. To mislead the enemy as to the real point of our intended landing, I requested General Garcia to send a small force (about 500 men), under General Rabi, to attack the little town of Cabanas, situated on the coast a few miles to the west of the entrance to Santiago Harbor, and where it was reported the enemy had several hundred men intrenched, and from which a

trail leads around the west side of the bay to Santiago.

I also requested Admiral Sampson to send several of his war ships, with a number of my transports, opposite this town for the purpose of making a show of disembarking there. In addition I asked the admiral to cause a bombardment to be made at Cabanas, and also at the forts around the Morro, and at the towns of Aguadores, Siboney and Daiquiri. The troops under General Garcia remaining at Aserraderos were to be transferred to Daiquiri, or Siboney on the 24th. This was successfully accomplished at Siboney."

Report of Secretary of War, 1898, p. 61.

"Early on this date (June 23d) General Lawton's advance reached Siboney, the Spanish garrison of about 600 men retiring as he came up, and offering no opposition except a few scattering shots at long range. Some of the Cuban troops pursued the retreating Spaniards and skirmished with them."

Ibid., p. 62.

"After the engagement at La Guasima, and before the end of the month, the army, including General Garcia's command, which had been brought on transports to Siboney from Asseraderos, was mostly concentrated at Sevilla, with the exception of the necessary detachments at Daiquiri and Siboney."

Ibid., p. 63.

"A few Cubans assisted in the attack at El Caney, and fought valiantly, but their numbers were too small to materially change the strength, as indicated above. * * * Up to this time I had been unable to complete the investment of the town with my own men, but to prevent any more reinforcements coming in, or the enemy escaping, I extended my lines as rapidly as possible to the extreme right, and completed the investment of the place, leaving General Garcia's forces in the rear of my right flank to scout the country for any approaching Spanish reinforcements, a duty which his forces were very competent to perform."

Ibid., pp. 68–69.

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The following are from messages and reports included in the Report of the Secretary of the Navy:

"Have received reliable information from Cuban officer the Spanish forces in the vicinity of Santiago consist of 7,000 men; * * * with superior force and insurgent force, which are ready, though mostly needing arms, Santiago de Cuba must fall," &c.

Rear Admiral Sampson to the Secretary of the Navy, June 8, 1898. Message and Documents, 1898-1899, Vol. IV. (abridgement), p. 667.

"The landing of the army was completed yesterday afternoon, all having disembarked, with the addition of 2,978 Cubans of General Garcia's forces, who were brought from Acerraderos to Siboney," &c.

Ibid, p. 683

"I respectfully report that the U. S. S. *Peoria*, under my command, left Key West June 25, convoying a landing expedition on the steamships *Florida* and *Fanita*. The forces on board these steamships consisted of about 300 Cubans under General Nuñez, 50 troopers of the Tenth United States Cavalry, under Lieutenant Johnson, and 15 volunteers under Mr. Winthrop Chanler. * * * On June 29 a landing was attempted. * * * but the enemy developed in such force that General Nuñez decided to abandon the attempt at this point. * * * A blockhouse was observed at the mouth of the Tayabacao River, * * * and this ship steamed within range and threw shell into this blockhouse and its vicinity; but eliciting no response or any sign of life, two boat loads of scouts, one of 15 Cubans under Captain Nuñez, and the other, of 15 volunteers, under Mr. Chanler, were landed, this ship occupying a position to protect the landing. As the boats reached the shore * * * a very destructive fire was opened upon them by a considerable force of Spaniards, who had remained concealed in earthworks about the blockhouse. Captain Nuñez was killed as he reached the shore, and several others were wounded.

* * * * * *

> The next day General Maximo Gomez appeared at Palto Alto, and a conference was held, at which General Gomez submitted in writing a plan of campaign, which is hereby respectfully forwarded. General Gomez expressed his ability to hold the position at Palo Alto for at least thirty days from July 4. He stated that he had at that time about 2,000 men under arms and could have a larger force were he able to arm and feed them."
>
> Lieutenant T. W. Ryan, commanding U. S. S. *Peoria* to Commodore Remey, July 14, 1898. *Ibid.*, pp. 690-691.

No better proof of the perfect sympathy and harmony of purpose between the troops of the United States and the Cuban army can be had than the following:

> "While enduring the hardships and privations of such a campaign, the troops generously shared their scanty food with the 5,000 Cuban patriots in arms, and the suffering people who had fled from the besieged city (Santiago)."
>
> General Field Order No. 1, Sibony, Cuba, July 16, 1898. Report of Secretary of War, 1898, No. 39.

16. *The United States enters upon the "military occupation" of Santiago and the eastern part of the Province of Santiago.*

Although the conditions of the surrender of Santiago were not finally agreed upon until July 15th (*ante*, p. 36), nevertheless, two days before that time, namely, on the 13th of July, 1898, the President issued the following executive order:

> "EXECUTIVE MANSION,
> Washington,
> JULY 13, 1898.
>
> THE SECRETARY OF WAR:
>
> Sir: The capitulation of the Spanish forces in Santiago de Cuba and in the eastern part of the Province of Santiago, and the occupa-

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tion of the territory by the forces of the United States, render it necessary to instruct the military commander of the United States as to the conduct which he is to observe during the military occupation.

The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of *a new political power*. Under this changed condition of things the inhabitants, so long as they perform their duties, are entitled to security in their persons and property and in all their private rights and relations. It is my desire that the inhabitants of Cuba should be acquainted with the purpose of the United States to discharge to the fullest extent its obligations in this regard. It will therefore be the duty of the commander of the army of occupation to announce and proclaim in the most public manner that we come not to make war upon the inhabitants of Cuba, nor upon any party or faction among them, but to protect them in their homes, in their employments, and in their personal and religious rights. All persons who, either by active aid or honest submission, co-operate with the United States in its efforts to give effect to this beneficient purpose will receive the reward of its support and protection. Our occupation should be as free from severity as possible.

Though the powers of the military occupant are absolute and supreme, and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, *so far as they are compatible with the new order of things*, until they are suspended or superseded by the occupying billigerent; and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion. The judges and the

other officials connected with the administration of justice may, *if they accept the supremacy of the United States*, continue to administer the ordinary law of the land as between man and man under the supervision of the American commander in chief. The native constabulary will, so far as may be practicable, be preserved. The freedom of the people to pursue their accustomed occupations will be abridged only when it may be necessary to do so.

While the rule of conduct of the American commander in chief will be such as has just been defined, it will be his duty to adopt measures of a different kind if, unfortunately, the course of the people should render such measure indispensable to the maintenance of law and order. He will then possess the power to replace or expel the native officials in part or altogether, to substitute new courts of his own constitution for those that now exist, or to create such new supplementary tribunals as may be necessary. In the exercise of these high powers the commander must be guided by his judgment and his experience and a high sense of justice.

One of the most important and most practical problems with which it will be necessary to deal is that of the treatment of property and the collection and administration of the revenues. It is conceded that all public funds and securities belonging to the Government of the country in its own right and all arms and supplies and other movable property of such Government may be seized by the military occupant and converted to his own use. The real property of the State he may hold and administer, at the same time enjoying the revenues thereof; but he is not to destroy it save in the case of military necessity. All public means of transportation, such as telegraph lines, cables, railways, and boats, belonging to the state, may be appropriated to his use, but unless in case of military necessity they are not to be destroyed. All churches and buildings devoted to religious worship and to the arts and sciences, all schoolhouses, are, so far as possible, to be protected, and all destruction or intentional defacement of such

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places, of historical monuments or archives, or of works of science or art is prohibited save when required by urgent military necessity.

Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways, and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained.

While it is held to be the right of the conquerer to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possessions by conquest, and to apply the proceeds to defray the expenses of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contribution to the expenses of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of judges and the police, and for the payment of the expenses of the army.

Private property taken for the use of the army is to be paid for when possible in cash at a fair valuation, and when payment in cash is not possible receipts are to be given.

All ports and places in Cuba which may be in the actual possession of our land and naval forces will be opened to the commerce of all neutral nations, as well as our own, in articles not contraband of war, upon payment of the prescribed rates of duty which may be in force at the time of the importation.

WILLIAM MCKINLEY."

This order is in identically the same language as the executive order issued to the Secretary of War on the sending of an army of occupation to the

Philippines after the destruction of the Spanish fleet at Manila.

Cuba is treated as "enemy's country," its possession and occupation by the American forces are regarded as the exercise of a belligerent right resulting from the invasion and conquest of Spanish territory, and the President assumes to apply to it the same rules which, in time of war, a military commander, under the laws of war, is justified in invoking when he occupies by force the hostile territory of an enemy.

The order placed the island of Cuba and the Philippine Islands in precisely the same position, quite regardless of the fact that the President had declared the people of the island of Cuba to be free and independent, and that their territory was friendly ground, and we their allies in a joint war against Spain, whose sovereignty in Cuba the President had determined was entirely extinguished at the time of the joint resolution.

17. *The Protocol of August* 12, 1898.

On the 12th of August the following protocol was signed between the representatives of the United States and Spain:

> "1. That Spain will relinquish all claim of sovereignty over and title to Cuba.
>
> 2. That Porto Rico and other Spanish islands in the West Indies and an island in the Ladrones, to be selected by the United States, shall be ceded to the latter.
>
> 3. That the United States will occupy and hold the city, bay and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition and government of the Philippines.
>
> 4. That Cuba, Porto Rico and other Spanish islands in the West Indies shall be immediately evacuated, and that commissioners, to be appointed within ten days, shall within thirty days from the signing of the protocol meet at Havana and San Juan, respectively,

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to arrange and execute the details of the evacuation.

5. That the United States and Spain will each appoint not more than five commissioners to negotiate and conclude a treaty of peace. The commissioners are to meet at Paris not later than the first of October.

6. On the signing of the protocol hostilities will be suspended, and notice to that effect will be given as soon as possible by each Government to the commanders of its military and naval forces."

30 Stat., 1742.

18. *The Treaty of Paris.*

On the day the protocol was signed the President instructed the United States military and naval commanders to cease hostilities, and the blockades of Cuba, Porto Rico and Manila were lifted.

The protocol was followed by the appointment of commissioners by the two governments, who met in Paris. Sessions were held from time to time until November 21st, when the treaty was agreed upon. It was signed December 12th.

The treaty, so far as its provisions can in any way affect the present case, is as follows:

> ARTICLE I. Spain relinquishes all claim of sovereignty over and title to Cuba.
>
> And as the island is, upon the evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may, under international law, result from the fact of its occupation for the protection of life and property.
>
> ARTICLE II. Spain cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the Island of Guam, in the Marianas or Ladrones.
>
> ARTICLE III. Spain cedes to the United States the archipelago known as the Philippine Islands.
>
> * * * * *

ARTICLE VI. Spain will, upon the signature of the present treaty, release all prisoners of war and all persons detained or imprisoned for political offenses in connection with the insurrection in Cuba and the Philippines and the war with the United States.

Reciprocally the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

The Government of the United States will, at its own cost return to Spain and the Government of Spain will at its own cost return to the United States, Cuba, Porto Rico and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article.

ARTICLE VII.—The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government which which may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war. The United States will adjudicate and settle claims of its citizens against Spain relinquished in this article.

ARTICLE VIII.—In conformity with the provisions of Articles I., II. and III. of this treaty, Spain relinquishes in Cuba and cedes in Porto Rico and other islands in the West Indies, in the island of Guam, and in the Philippine Archipelago all the buildings, wharves, barracks, forts, structures, public highways and other immovable property which in conformity with law belong to the public domain and as such belong to the Crown of Spain.

* * * * *

ARTICLE IX.—Spanish subjects, natives of the Peninsular, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their right to sell

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or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain the territory they may preserve allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

The civil rights and political status of the native inhabitants of the territory hereby ceded to the United States shall be determined by Congress.

ARTICLE X.—The inhabitants of the territory over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of their religion.

ARTICLE XI.—The Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignty shall be subject in matters civil as well as criminal to the jurisdiction of the courts of the country wherein they reside, pursuant to the ordinary laws governing the same; and they shall have the right to appear before such courts and to pursue the same course as citizens of the country to which the courts belong.

ARTICLE XII.—Judicial proceedings pending at the time of the exchange of ratifications of this treaty in the territories over which Spain relinquishes or cedes her sovereignty shall be determined according to the following rules:

First: Judgments rendered either in civil suits between private individuals or in criminal matters, before the date mentioned, and with respect to which there is no course or right to review under the Spanish law, shall be deemed to be final, and shall be executed in due form by competent authority in the territory within which such judgments should be carried out.

Second: Civil suits between private individuals which may on the date mentioned be

undetermined shall be prosecuted to judgment before the court in which they may then be pending, or in the court that may be substituted therefor.

Third: Criminal actions pending on the date mentioned before the Supreme Court of Spain against citizens of the territory which by this treaty ceases to be Spanish shall continue under its jurisdiction until finall judgment; but such judgment having been rendered, the execution thereof shall be committed to the competent authority of the place in which the case arose.

ARTICLE XIII.—The rights of property secured by copyright and patents acquired by Spaniards in the island of Cuba, and in Porto Rico, the Philppines and other ceded territories, at the time of the exchange of the ratifications of this treaty, shall continue to be respected. Spanish scientific, literary and artistic works not subversive of public order in the territories in question shall continue to be admitted free of duty into such territories for the period of ten years, to be reckoned from the date of the exchange of the ratifications of this treaty.

ARTICLE XIV.—Spain shall have the power to establish consular officers in the ports and places of the territories the sovereignty over which has either been relinquished or ceded by the present treaty.

* * * * * *

ARTICLE XVI.—It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will upon the termination of such occupancy advise any Government established in the island to assume the same obligations.

30 Stat., 1754.

On January 4, 1899, the treaty was transmitted to the Senate by the President with a report of the American Commissioners and copies of statements made before them. The treaty was ratified on the 6th of January.

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It was signed on March 17th by the Queen Regent of Spain. Ratifications were exchanged in Washington, and the treaty was proclaimed by the President on the 11th of April.

30 Stat., 1754.

19. *The Secretary of War, by direction of the President, creates a military division, to be known as the "Division of Cuba," under command of a United States Army officer, who is designated "Military Governor of the Island."*

The day after the treaty was signed (December 13, 1898), the following order was issued by the Secretary of War:

> "By direction of the President, a division to be known as the Division of Cuba, consisting of the geographical departments and provinces of the island of Cuba, with headquarters in the City of Havana, is hereby created, under command of Maj.-Gen. John R. Brooke, U. S. A., who, in addition to command of the troops in the division, will exercise the authority of military governor of the island.
>
> R. A. ALGER,
> Secretary of War."

General Brooke's Civil Report, 1898,* p. 1.

General Brooke proceeded to Havana, Cuba, arriving on December 27. On the following day he issued the following order, viz:

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* Gen. Brooke's report was printed pursuant to a concurrent resolution (No. 11, Feb. 12, 1900) which provided "that there be printed seven thousand copies of so much of the civil reports of Major-General John R. Brooke, Military Governor of the Island of Cuba, made to the Adjutant-General of the United States Army, with accompanying papers and documents, as is in the English language, together with a prepared index, of which 2,000 copies shall be for the use of the Senate, 4,000 copies for the use of the House of Representatives, and 1,000 for the use of the War Department." The Deficiency Appropriation Bill (Chap. 785), passed July 6, 1900, provided for the payment of the expense of printing the report.

"General Orders, }
No. 1. }
HEADQUARTERS' DIVISION OF CUBA,
HAVANA, December 28, 1898.

In accordance with the order of the President, * * * the undersigned hereby assumes command of the Division of Cuba, and by the requirements of the same order will exercise the authority of military governor of the island of Cuba.

JOHN R. BROOKE,
Major-General, U. S. A.

Ibid.

20 *Spanish sovereignty in Cuba is formally relinquished and transferred to the Military Governor in the name of the United States.*

At noon, on January 1, 1899, accompanied by his staff, and a number of Cuban generals, General Brooks proceeded to the palace of the Spanish Governor-General,

> " where the relinquishment of Spanish sovereignty in Cuba was formally made to the United States Evacuation Commission, which immediately *transferred to the military governor of Cuba, in the name of the United States, the sovereingty* thus relinquished."
>
> *Ibid.*, p. 2.

The formal and complete evacuation of the island by the Spanish army was accomplished on February 6, 1899.

Ibid.

21. *The Cuban Army disbands.*

A perplexing question confronting the President after the restoration of peace was the disposition to be made of the Cuban Army.

The American forces sent to Cuba under General Shafter consisted of but 17,000 men, and at no time did the American troops stationed there during the war exceed that number. The army of occupation

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only numbered about 22,000, whereas the muster rolls of the Cuban army showed a force of 48,000.

General Brooks' Civil Report, 1899, p. 6.

The Cubans were not agreed among themselves as to the course to be followed, but a commission was sent to Washington to discuss the matter with our officials. After conferences with the President and his advisers an agreement was reached whereby the Cubans were to disband and surrender their arms, provided the sum of $3,000,000 was distributed among them.

This was followed by the incorporation in the Act of January 5, 1899, entitled "An Act making appropriations to supply urgent deficiencies in the appropriation for the support of the military and naval establishments for the last six months of the fiscal year ending June 30, 1899, and for other purposes" of the following provision:

"MILITARY ESTABLISHMENT,

Office of the Secretary of War.

For emergency fund to meet unforeseen contingencies constantly arising, to be expended at the discretion of the President, three million dollars."

30 Stat., 772.

The fund thus appropriated was credited to the Pay Department of the Army on the books of the Treasury Department, and the War Department was charged with the accounting and auditing and distribution of the fund by order of the Secretary of War.

The money was distributed between May 27 and September 12, 1899. 33,930 non-commissioned officers and enlisted men were paid $75 each, or $2,544,750 in all, and on September 21st the unexpended balance of $455,250 was turned back into the Treasury to the credit of the fund named.

Apparently no Executive order was signed by the President, the order of the Secretary of War being considered sufficient authority.

Speaking of the distribution of this fund, General Chaffee says:

> "Pursuant to arrangements, $3,000,000 were received at Havana, on March 17, for disbursement to the Cuban army. It was at first proposed to distribute $100 to each officer and man, on the general assumption that the army did not exceed 30,000. It was decided to exclude all officers; also all men who were known to have employment at monthly wages paid by the State. * * * On May 27, the first payment was made. * * * The rolls as prepared and delivered to the paymasters, footed *39,966 men.* Forty thousand was used as a devisor, instead of 30,000, allowing to each man $75."
>
> Report of Brig. Gen. Adna R. Chaffee, U. S. V., Chief of Staff, to Maj.-Gen. Brooke, Military Governor, October 20, 1899, printed in Gen. Brooke's Civil Report for 1899. Report of Secretary of War, Vol. I., Part 6, p.129.

Regarding the disbandment of the Cuban army and the distribution of this fund among its members, General Brooke says:

> "Outside of the principal towns the retiring Spanish army was closely followed *by the Cuban army,* which took charge of the towns and country, maintaining order, and, generally, performing police duty. This state of affairs continued, substantially, until the final disbandment of that army. The disbandment of the Cuban army was commenced in November, 1898, but only such as could procure work, or were anxious to resume their former vocations, seem to have taken advantage of the 'licencia' (furlough) which was given to many. A large part of the army was held together on various pretexts until the distribution of the $3,000,000 and the giving up of their arms effected a final disbandment.

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During the time the army was held together as an organized body the police duties performed seemed to be well done and order was preserved.

The spectacle of an army of, according to the rolls, *48,000 men* being peacefully dispersed among the people has for its prototype the disappearance of the great volunteer army of the United States in 1865. In neither case has there been any great disturbance as was feared in both cases, and particularly so as regards the Cuban army. The small attempts at brigandage were quickly suppressed, the lawbreakers placed in prison, and the courts are now hearing their cases. * * *

The desire of a large body of the Cuban army to take part on the 1st of January in the ceremonies of the relinquishment of sovereignty by Spain was reported verbally, by General Ludlow, and he was informed that the danger to life and property was too great, and that the celebration must be postponed to a time when the excitement had cooled off and the passions of the people could be under control. This celebration afterwards took place on the arrival in the city of Gen. Maximo Gomez, Commander in-Chief of the Cuban forces, on February 24. General Ludlow was directed to meet General Gomez at the city limits and show him every courtesy possible. The Quinta de los Molinos, the summer residence of the Governor-General, was placed at his disposal, and for several months he, with his staff and escort, occupied the houses and grounds as the guests of this Government."

Gen. Brooke's Civil Report for 1899, pp. 6–7.

"Mr. Robert P. Porter arrived at Habana on or about January 30, with letters from the Secretary of War, which explained the object of his visit and indicated the desire of the President that Mr. Porter be aided in carrying out the purpose of his coming. After a conference with the Military Governor, in which the purpose of his visit was fully made known, arrangements were hastily made for the journey to his destination. At Mr. Porter's request, an officer of the Military Gov-

ernor's staff, Capt. J. A. Campbell, was directed to accompany him. On his return, Mr. Porter announced the success of his mission and left almost immediately for Washington. A note to General Gomez was taken to him by Mr. Porter, in which the General was cordially invited to come to Habana and confer with the Military Governor as to the distribution of the $3,000,000 which had been allotted for the purpose of aiding the soldiers of the Cuban army to return to their homes, and, so far as was possible, to enable them to re-establish their homes and resume their vocations. General Gomez replied, saying that he would proceed to Habana at an early day and that he would do all in his power to accomplish the purpose.

General Gomez reached Habana late in February, and after several conferences with the Military Governor, a plan was determined upon to distribute the money among the Cuban soldiery. The money in the meantime arrived, was placed on an army transport and safeguarded by a strong detachment of United States infantry.

The Cuban Army Assembly was in session during this time and developed a strong opposition to General Gomez, which delayed the preparation of the rolls of the various bodies of troops. Finally, the Assembly deposed General Gomez by abolishing the grade he occupied. This created a serious delay, as the data on which to base the rolls was under its control and could not be obtained. The Military Governor continued to recognize General Gomez as the representative of the Cuban army."

Ibid, p. 16.

22. *Of the administration of the affairs of Cuba by the President, and of the courts through which he assumes to administer justice.*

The permanent military regimé in Cuba was inaugurated by the publication of the following proclamation:

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"HEADQUARTERS DIVISION OF CUBA,
HABANA, JANUARY 1, 1899.

TO THE PEOPLE OF CUBA:

Coming among you as the representative of the President, in furtherance and in continuation of the humane purpose with which my country interfered to put an end to the distressing condition in this island, I deem it proper to say that the object of the present Government is to give protection to the people, security to person and property, to restore confidence, to encourage the people to resume the pursuits of peace, to build up waste plantations, to resume commercial traffic, and to afford full protection in the exercise of all civil and religious rights.

To this end, the protection of the United States Government will be directed, and every possible provision made to carry out these objects through the channels of civil administration, although under military control, in the interest and for the benefit of all the people of Cuba, and those possessed of rights and property in the island.

The civil and *criminal code* which prevailed prior to the relinquishment of Spanish sovereignity *will remain in force, with such modifications and changes as may from time to time be found necessary in the interest of good government.*

The people of Cuba, without regard to previous affiliations, are invited and urged to co-operate in these objects by exercise of moderation, conciliation, and good will one toward another, and a hearty accord in our humanitarian purposes will insure kind and beneficent government.

The military governor of the island will always be pleased to confer with those who may desire to consult him on matters of public interest.

JOHN R. BROOKE,
Major-General, Commanding Division of Cuba and Military Governor."

Gen. Brooke's Civil Report, p. 7.

Since that time the President, through the instrumentality of the military governor and the troops

of the United States, has governed the Island of Cuba by martial law.

The military governor assumes to exercise and has in fact exercised, absolute executive, legislative and judicial power over the affairs of the island and its people, and rules the island by his sole and uncontrolled will, subject to no supreme authority save that of the President, who adopts the orders and decrees the military governor if he does not revoke them. In the exercise of the authority which he assumes to possess, the military governor has taken into his hands and subjected to his absolute power all the departments of government in Cuba. He assumes and exercises absolute power and authority over all persons and all property. He assumes to enact, modify, amend or repeal laws, establish, reorganize or abolish courts, civil and criminal, adopt or change rules of judicial procedure, and in general to deal with the administration of justice in the island as he sees fit.

Record, pp. 4–5.

He accords to accused persons none of the rights and privileges guaranteed by the Constitution, *e. g.*, *habeas corpus*, indictment by a grand jury, trial by jury, &c.

On the 11th day of January, 1899, he issued a military edict or order, whereby he established four departments of the "civil" government, to be known as the department of state and government, the department of finance, the department of justice and public instruction, and the department of agriculture, commerce, industries and public works, each under the charge of a secretary; and on the following day he announced his appointment of secretaries of each department.

Record, p. 5; Gen. Brooke's Civil Report, p. 8.

On the 14th of April, 1899, he published a military order creating a supreme court, with jurisdiction

throughout Cuban territory, composed of a president or chief justice, six associate justices, one fiscal, two assistant fiscals, one secretary or chief clerk, two deputy clerks, and other subordinate employees, with administrative functions as well as those of a court of justice in civil and criminal matters.

Record, p. 5; Gen. Brooke's Civil Report, p. 34.

By article XXXVII. of this same order he declared that to be eligible for appointment to the office of president, justice, fiscal, assistant fiscal, or deputy clerk of the supreme court the person must (among other things) be a Cuban or provided he was a person included within the provisions of article 9 of the Treaty of Paris declare on oath that he accepted Cuban citizenship.

Record, p. 5; Gen. Brooke's Civil Report, p. 38.

On the 15th of June, 1899, he issued a military edict or order creating and prescribing the jurisdiction of the "audiencias," of the island, or ordinary courts for the trial of criminal offences.

Record, pp. 5-6; Gen. Brooke's Civil Report, p. 49.

By article XLI. of the same order he declared article XXXVII. (before mentioned) of the order creating the supreme court applicable to the functionaries of the "audiencia."

Ibid, p. 53.

The supreme court, the "audiencias," and certain tribunals called "courts of first instance" are the only courts in Cuba exercising or assuming criminal jurisdiction. All of them are organized, controlled, and operated by the military governor, who assumes power to appoint, suspend, and remove

their members, officers, and employees at his pleasure. They act as the mere agents and instruments of the military governor, and are wholly dependent for their existence and continuance upon his will.

Record, p. 6.

Under the system now in force there is no means of trying offenders against the laws in force in Cuba (whatever these laws may be), except through the instrumentality of these courts, or of such others as the military governor may see fit to create.

Ibid.

As we have seen, he does not regard the Constitution as in the least limiting or restricting his governmental power, for he denies to accused persons the dearest rights accorded by that instrument.

The decrees having relation to the organization of the courts and on kindred subjects will be found in Gen. Brookes' report.

There is no reason for referring more particularly to these decrees or to the various other military edicts of the military governor. Their contents are quite immaterial. The point is that they demonstrate that the government in vogue in Cuba is that of a military dictatorship. If the military governor can enact legislation he can modify or appeal it at his pleasure—at any time, and in any manner. Hence, even since this case arose the entire system may have been abolished, and some other system of which we are wholly ignorant have been substituted.

It must not be supposed, because the Military Governor has heretofore permitted the courts in Cuba as now constituted to administer criminal justice, that the appellant must necessarily be tried in those courts.

He, the military governor, can (if he has the power he assumes to exercise) at any moment abolish those courts and establish such others as he chooses.

For it must be borne in mind that his will is the only law in force in Cuba.

23. *The system of penal laws in vogue in Cuba before the American intervention, which (with but slight modifications) the Military Governor assumes to now enforce.*

When the United States military authorities entered upon the occupation of the Island of Cuba the government was that of monarchical Spain, modified by the so-called system of autonomy which had been in existence for about a year, and which was a concession to the protests of the United States against the long-existing oppression of the Cuban people formerly pursued by the Spanish rulers.

Major Edgar S. Dudley, U. S. V., Judge Advocate of the Division of Cuba, in a report to the Adjutant-General dated September 30, 1899, and printed in General Brooke's Civil Report, at page 163, says:

> "The laws existing were those of the Latin-speaking races of people generally existing under a monarchical form of government. While the laws themselves provide in most instances proper remedies, the law of procedure and the administration of the laws were entirely antagonistic to all modern methods of practice and recognition of the personal rights of men. The Courts were said, and appeared from satisfactory indications, to be corrupt-largely due to the methods pursued in crim, inal cases."

Again at page 165 he says:

> "The law of procedure, especially in criminal cases, was not based upon any consideration of the rights of men, but rather appears to have been a relic of the dark ages, with a slight touch of the inquisition in the powers held by judges under the 'incomunicado' which existed. Much injustice and many hardships have been due to the absence of those remedial writs which give to the Anglo-Saxon legal assurance of proper regard for his personal rights of liberty and to property."

In the report of Mr. Pablo Disvernine, Secretary of Finance, to General Brooke, dated October 1, 1899, that gentleman, himself a native Cuban, speaking of the Spanish Code (under which one of the charges against the appellant was instituted), said:

> "The Penal Code was the principal and most efficient instrument devised for the violation of the constitutional guarantees under the disguise of pretending to secure and to sanction with the penalty of the law, the abuse or misuse of said constitutional rights."

It is true that the Military Governor has undertaken to abolish or ameliorate some of the more flagrant evils of the old system; but notwithstanding his benevolent attempts in this direction, the present condition of affairs, so far as the administration of criminal justice is concerned, is abhorrent to every principle of American law and justice. The mere fact of accusation raises the presumption of guilt and accused persons are dealt with upon that presumption through all stages of criminal proceedings. There is no presentment or indictment by a Grand Jury. There is no right to trial by jury. The writ of *habeas corpus* is unknown. The courts are composed of judges selected by the military authorities, and hold office during their pleasure. The entire system is under the absolute control of the Military Governor. He can appoint or remove the officers of the court as he sees fit. The old Spanish system, with the slight modifications referred to, remains practically unchanged. As Mr. J. A. Gonzalez Lanuza, Secretary of Justice and Public Instruction, said in his report of September 16, 1899 (p. 253):

> "The legal system—the system as a whole, remains unchanged because there was neither time nor opportunity to change it."

Although General Brooke in his final report of December 20, 1899 (p. 428) says that the introduction of the writ of *habeas corpus* "has been *under con-*

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sideration for some time," the idea of substituting the presumption of innocence, which is one of the fundamental principles of our American system, for that of guilt, or of giving the accused the right to a trial by jury, has apparently never been thought of.

The views of the present military governor are interesting and in point:

> "Under the existing condition of things in Cuba no means are provided for the trial of * * * civilian employes of the military establishment for offenses not cognizable under the articles of war, *except the Cuban Courts* * * * I do not believe that it is wise or prudent, or in any way desirable to subject American citizens, who are in the service of their own government, to the jurisdiction and capricious decisions of tribunals composed of persons *alien in race and sentiment, administrating a system of laws with which Americans are entirely unfamiliar, and which would not be tolerated in any American community.*"
>
> Special report on Insular affairs, &c., October 5, 1899, by Brig.-Gen. Leonard Wood, U. S. V., then commanding department of Santiago and Puerto Principe, Cuba, and now Military Governor of the Island of Cuba. Washington, Government Printing Office, 1899.

II.

Of the status of Cuba since the late intervention and the relations between the United States and the Cuban people, as shown by congressional legislation.

(*a.*) On the 18th of May, 1898, Congress passed an act entitled "An act to provide assistance to the in-

habitants of Cuba, and arms, munitions and military stores to the people of the Island of Cuba, and for other purposes," providing as follows:

> "That while serving in Cuba during the existing war, officers of the Army of the United States exercising separate command, may, by special order, cause subsistence, medical and quartermaster's supplies to be issued to, and other aid rendered to inhabitants of the Island of Cuba, who are destitute and in imminent danger of perishing unless they receive the same.
>
> Sec. 2. That the President and general officers comanding troops in Cuba are hereby authorized to furnish to the Cuban people such arms, ammunition, equipments, and military stores and supplies as they may require in order to increase their effective fighting force in the existing war against Spain."
>
> 30 Stat., 419.

(*b*.) By Chap. 423 (Army appropriation bill, Approved March 3, 1899), commonly spoken of as the Foraker amendment, it was provided:

> "Sec. 2. That no property, franchises or concessions of any kind whatever shall be granted by the United States, or by any military or other authority whatever, in the Island of Cuba during the occupation thereof by the United States."
>
> 30 Stat., 1074.

(*c*.) The same Act provided, for—

> "Subsistence supplies to be issued to inhabitants of the island of Cuba who are destitute and in imminent danger of perishing unless they receive the same, one hundred thousand dollars."
>
> *Ibid.*, p. 1069.

(*d*.) 31 Stat., 27, entitled "An act relating to Cuban vessels, approved Feb. 10, 1900, is as follows:

> "That vessels owned by citizens of Cuba, and documented as such by officers of the

United States, shall hereafter be entitled in ports of the United States to the rights and privileges of vessels of the most favored nation, and they and their cargoes shall be subject to no higher charges in ports of the United States than are imposed on the vessels and cargoes of the most favored nation in the same trade.

Sec. 2. That the Secretary of the Treasury is hereby authorized to refund * * * upon application and satisfactory evidence, tonnage taxes and light dues which have been imposed on vessels owned by citizens of Cuba entering ports of the United States since April 11, 1899, which have been in excess of the tonnage taxes prescribed by Section 11 of the act of June 19, 1886."*

III.

Of the so-called "Department of Posts" of the Island of Cuba, and of the "Postal Code," proclaimed by the Military Governor.

(a.) *Of the Cuban postal service established by the President.*

1. By the Act of June 6, 1895, entitled, "AN ACT TO AUTHORIZE THE ESTABLISHMENT OF POST-OFFICES AT MILITARY POSTS OR CAMPS," it was provided:

"That during the continuance of the existing war the Postmaster-General may, in his

* Section 11 of the act of June 19, 1886, is as follows:

"SEC. 11. That section fourteen of 'An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying-trade, and for other purposes,' approved June 24th, 1884, be amended so as to read as follows:

SEC. 14. That in lieu of the tax on tonnage of thirty cents per ton per annum imposed prior to July first, eighteen hundred and eighty-four, a

discretion, establish a temporary post office at any military post or camp for the purpose of supplying the officers and troops there encamped with mails, the location of which post-office may at any time be changed to any other post or camp. On the establishment of such post-office he shall co-operate with the Secretary of War or officer commanding such post or camp for the purpose of securing the detail of an officer of the Regular or Volunteer Army of suitable rank to act as postmaster," &c.

"In any case where it is deemed impracticable by the military authorities to detail persons from the Army to act as postmaster or clerks the Postmaster-General is authorized to appoint a civilian as postmaster," &c.

30 Stat., 432.

2. On the 21st of July, 1898, the President issued the following executive order:

"In view of the occupation of Santiago de Cuba by the forces of the United States, it is ordered that postal communication between the United States and that port, which has been suspended since the opening of hostilities with Spain, may be resumed, subject to such military regulations as may be deemed necessary. As other portions of the *enemy's territory* come into the possession of the land and naval forces of the United States, postal

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duty of three cents per ton, not to exceed in the aggregate fifteen cents per ton in any one year, is hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any *foreign port or place* in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the coast of South America bordering on the Caribbean Sea, or the Sandwich Islands, or Newfoundland;

And a duty of six cents per ton, not to exceed thirty cents per ton per annum, is hereby imposed at each entry upon all vessels which shall be entered in the United States from any *other foreign ports*, not, however, to include vessels in distress or not engaged in trade;

Provided, That the President of the United States shall suspend the collection of so much of the duty herein imposed, on vessels entered from any *foreign port*, as may be in excess of the tonnage and light-house dues, or other equivalent tax or taxes, imposed in said port on American vessels by the Government of the *foreign country* in which such port is situated, and shall, upon the passage of this act, and from time to time

communication may be opened under the same conditions. * * * The revenues derived from such service are to be applied to the expenses of conducting it, and the United States postage stamps are therefore to be used. The Postmaster-General is charged with the execution of this order in co-operation with the military commander, to whom the Secretary of War will issue the necessary directions."

Messages and Papers of the Presidents, Vol. X., p. 216.

Report of the Postmaster-General, Nov. 21, 1898. Messages and Documents, 1898–1899, Vol. 2, pp. 1564–1565.

3. Speaking of the introduction of the postal service in Cuba, pursuant to the directions of this order, the Postmaster-General said in November, 1898:

"When our troops advanced into Cuba the postal service moved with them. Upon the surrender of Santiago de Cuba the postal agent of the United States, under the authority of the President and in co operation with

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thereafter as often as it may become necessary by reason of changes in the laws of the *foreign countries* above mentioned, indicate by proclamation the ports to which such suspension shall apply, and the rate or rates of tonnage-duty, if any, to be collected under such suspension.

Provided further, That such proclamation shall exclude from the benefits of the suspension herein authorized the vessels of any *foreign country* in whose ports the fees or dues of any kind or nature imposed on vessels of the United States, or the import or export duties on their cargoes, are in excess of the fees, dues, or duties imposed on the vessels (4) of the country in which such port is situated, or on the cargoes of such vessels;"

Section 12 of the same act provides: "That the President be, and hereby is, directed to cause the Government of *foreign countries*, which, at any of their ports, impose on American-vessels a tonnage tax or light-house dues, or other equivalent tax or taxes, or any other fees, charges, or dues, to be informed of the provisions of the preceding section, and invited to co-operate with the Government of the United States in abolishing all light-house dues, tonnage-taxes, or other equivalent tax or taxes on, and also all other fees for official services to, the *vessels of the respective nations* employed in the trade between the ports of such *foreign country* and the ports of the United States." Supp. to U. S. Rev. Stat., Vol. I. (1874–1891), Ch. 421.

the military commander, took possession of the post office of that city, which was made the military post office. He dispensed with the services of the Spanish director and ten of his large force of clerks, retaining such as were needed as interpreters, and proceeded with a much smaller force to put the office on a better and more effective footing. * * *

"When Porto Rico and portions of Cuba and the Philippines passed into the military possession of the United States, measures for the continuance or restoration of general mail facilities seemed to be an essential element of the beneficent presence of American authority. By order of the President, the establishment of the postal service followed the extension of military occupation. In harmony with the general policy adopted for the administration of the civil institutions in the regions which thus came under our control, the local system and provisions were retained as far as practicable and adapted to our methods.

"At the same time it was constantly borne in mind that these measures were taken by virtue of military possession. The general postal service was associated with the military postal service and operated by the same machinery. No new appointments, save in one or two instances, were made. Trained men from our home service were detailed as superintendents and agents and placed in charge of the larger offices, retaining such of the old employees as were needed or could be made available. In the smaller places the old postmasters are continued or other local officers are found. There has already been a great improvement over the old Spanish service, and the work has only just begun."

4. Shortly after the Treaty of Paris was signed, namely, December 21, 1898, the Postmaster-General issued the following order:

"In accordance with the order of the President, dated July 21, 1898, authorizing the extension of the postal service over territory coming into military possession of the United

States, the island of Cuba having come into such possession, it is ordered that E. G. Rathbone, of the State of Ohio, be, and he is hereby appointed Director of Posts of Cuba at a salary of $4,000 per annum. He will have general supervision and control of the postal service of the island, co-operating with the military commander, and be subject to such rules and regulations as may from time to times be promulgated by the Post Office Department."

5. On the 1st of January, 1899, Mr. Rathbone formally received and took charge of the "Bureau of Communications," as the postal department at Havana had been called. He immediately proceeded to organize a "Department of Posts." He created various bureaus in the Department and defined the duties of each. The first of these was the Bureau of Finance, created by Order No. 6, on the 7th day of January, 1899.

Report of Mr. E. G. Rathbone, Director-General of Posts, to Major General John R. Brooke, "Governor-General" of Cuba, August 28, 1899. Report of the War Department, 1899 (Civil Report of General Brooke), Vol. I, Part 6, pp. 414–415.

To the Bureau of Finance was assigned the charge and custody of postage stamps, stamped envelopes and postal cards; the supplying of postmasters upon their requisitions for these supplies, and also the furnishing of all other supplies, printing, stationery, &c., for the Department and the postmasters throughout Cuba.

Ibid, p. 416.

The appellant, who is a native-born citizen of the United States and an inhabitant of the State of Indiana, was the head of this bureau.

Transcript of Record, pp. 9 (17), 10 (20), 12 (23), 13 (25), 15 (29).

The appellant is not enlisted or commissioned in the United States military service, but is a civilian.

(*b.*) *Of the "Postal Code."*

This so-called "Postal Code" was the creation of the Military Governor, and its validity rests upon his power and authority as the military representative of the President. It originally appeared in the form of the following military order:

> "No. 115. HEADQUARTERS, DIVISION OF CUBA.
> HAVANA, July 21, 1899.
>
> "By direction of the Military Governor, the following Postal Code is hereby promulgated and declared to be the law relating to Postal affairs in Cuba.
>
> "All laws and parts of laws heretofore and now existing in the Island of Cuba inconsistent with the provisions of this order are hereby declared null and void.
>
> "SECTION I.
>
> "*Duties of Director-General of Posts.*
>
> "The Director-General of Posts of the Island of Cuba, appointed by the Postmaster-General of the United States and subject to his authority, shall have control and management of the Department of Posts.
>
> "It shall be his duty to establish such general offices and bureaus and service in connection therewith as in his judgment may be necessary to the proper conduct of the business of said Department, and to appoint persons to perform the duties appertaining thereto and to fix their compensation; and he is hereby invested with the power to remove such persons when in his judgment the good of said service requires it;
>
> To establish post-offices and discontinue the same when necessary, and appoint and remove postmasters and such other persons whose services may be connected with post offices as may be necessary to properly conduct the business thereof;
>
> To appoint all other persons employed in the transportation, collection and delivery of the mails, and for the performance of any other

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duty which in his judgment may be required; to fix the compensation of each, and to remove such persons when in his judgment such action may be necessary;

To establish and promulgate rules and regulations not inconsistent with the rules and instructions promulgated by the Secretary of War under date of May 11, 1899, to carry into effect the executive orders relating to the Military Government by the United States in the Island of Cuba, or such amendatory or supplementary orders as may hereafter be issued for said purpose, for the collection and disbursement of the revenues arising in the Department of Posts of Cuba, and to keep or cause to be kept proper accounts of all such receipts and expenditures;

To enter into contracts or agreements for the transportation of the mails over post roads in said island, and to prescribe such rules and regulations as may in his judgment be necessary to the enforcement of such contracts or agreements;

To enter into all such other contracts and agreements as in his judgment may be necessary to the proper conduct of the service of said department in all its branches, and to establish and promulgate rules and regulations therefor; and

To prescribe all rules and regulations, not inconsistent with existing laws in said island or such laws as may hereafter be enacted or promulgated, as in his judgment may be necessary for the management and conduct of the business of said department, and to do all things that may be necessary to give full force and effect to the powers hereby vested in him; and the rules and regulations heretofore adopted and promulgated by him are hereby ratified and continued."

General Brooke's Civil Report, p. 75.

Section 2 authorizes the Director-General of Posts to require bonds of postmasters, contractors and employees.

Section 4 declares that the term "island of Cuba,"

when "used in the laws herein promulgated," shall include

> "all the mainland and islands adjoining under the present government in control by virtue of the military occupation of the United States."

Section 5 declares that the term "dollars," when so used, shall be held to mean "dollars in money of the United States of America or their equivalent."

Sections 5 to 62, inclusive, define and affix penalties for various offenses against the Cuban postal system. These penalties range from small fines to life imprisonment (Sec. 27).

Section 37 is as follows:

> *Unlawful pledging or sale of stamps.*
>
> Whoever, being a postmaster or other person employed in any branch of the Department of Posts, and being intrusted with the sale or custody of postage stamps, stamped envelopes, or postal cards, shall issue or dispose of them in the payment of debts, or in the purchase of merchandise or other salable articles, or pledge or hypothecate the same, or sell or dispose of them except for cash or sell or dispose of postage stamps or postal cards for any larger or less sum than the values indicated on their faces, or sell or dispose of stamped envelopes for a larger or less sum than is charged therefor by the Department of Posts for like quantities; or sell or dispose of, or cause to be sold or disposed of, postage stamps, stamped envelopes, or postal cards at any point or place outside of the delivery of the office where the postmaster or other person is employed, or induce, or cause to be induced, for the purpose of increasing the emoluments or compensation of the office, any person to purchase postage stamps, stamped envelopes, or postal cards at the office where such postmaster or other person is employed when such person does not reside nor do business within the delivery of such post-office; or sell or dispose of postage stamps, stamped envelopes, or postal cards otherwise than as provided by law and the regulations of

the Department of Posts, shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment for not more than one year, or both such fine and imprisonment.

Section 55 is entitled "Misappropriation of money or property," and is as follows:

"Whoever, being a postmaster, assistant postmaster, cashier, or other person employed in or in any way connected with the business or operations of any branch of the service of the Department of Posts, shall convert to his own use any money, postage stamps, stamped paper, or other property of the Department of Posts, or in the custody of, or in use by, said Department, or postal, money order, or other funds coming into his hands in any manner whatever, or any money or property which may have come into his possession or under his control in the execution of such office, employment, or service, or under color or claim of authority as such officer, employee, or agent, whether the same shall be the money or property of the Department of Posts or in the custody of, or in use by said Department, or of some other person or party; or shall fail safely to keep any such money, stamps, stamped paper, postal, money order, or other funds, or other property, whether the same is the property of the Department of Posts or in the custody of, or in use by, said Department, or the property of some other person or party, without loaning, using, depositing in banks, except as authorized by the regulation of the Department of Posts, or exchanging for funds or property other than such as are especially allowed by the regulations of the Department of Posts; or shall fail to remit to or deposit at a designated depository, or turn over to the proper officer or officers, agent or agents, any such money, stamps, stamped paper, postal, money order or other funds, or other property, whether the same is the property of the Department of Posts or in the custody of, or in use by, said Department, or the property of some other person or party, when required so to do by law or the regulations of

the Department of Posts, or upon demand or order of the Director-General of Posts, either directly or through a duly authorized and accredited officer or agent of the Department of Posts, or shall advise or participate in any of the offenses defined in this section, shall for every such offense be punished by imprisonment for not less than six months nor more than ten years, or by a fine in a sum equal to the amount embezzled, or by both such fine and imprisonment; and any failure to produce any money, postage stamps, stamped paper, postal, money order or other funds, or other property, whether the property of the Department of Posts or in the custody of, or in use by, said Department, or the property of any other person or party, when required so to do as hereinbefore provided, shall be taken to be *prima facie* evidence of such offense. But nothing shall be construed to prohibit any postmaster from depositing, under the direction of the Director-General of Posts, in a bank designated by the Director-General of Posts for that purpose, or in any other place, provided the Director-General of Posts shall so specifically authorize, to his own credit as postmaster, any funds in his charge, nor prevent his negotiating drafts or other evidences of debt through such banks or otherwise, when instructed or required to do so by the Director-General of Posts, for the purpose of remitting surplus funds from one post-office to another or to a designated depository."

Section 63, entitled "Courts having jurisdiction to take cognizance of crimes against Department of Posts, &c.," provides that –

> "Judges of the First Instance and Instruction shall have and are hereby given jurisdiction and authority to take cognizance of the offenses herein enumerated, and hear testimony and make investigation as is now provided by law in other offenses, and if they shall determine from the evidence presented that there is probable cause to believe that the party accused is guilty of the offense charged against him, they shall admit such person to bail, or in default of good and sufficient

bail, commit him to jail to await the action of the Criminal Court having jurisdiction of the matter, as hereinafter provided;

Provided, That the offense shall have been committed in any part of the province in which the judicial district of the judge is located;

That the accused shall have been apprehended in any part of the province in which the judicial district of the judge is located; although the offense may have been committed elsewhere; and

That the accused shall have been apprehended out of the Island of Cuba and brought into the province in which the judicial district of the judge is located, without respect to where the offense may have been committed."

Section 64, entitled "Courts having jurisdiction to try offenses against Department of Posts," provides that—

> "Criminal Courts ('Audiencias de lo Criminal') shall have judisdiction in all cases herein set forth when the offense shall have been committed in the judicial district in which the court now has, by law, criminal jurisdiction, or without reference to where the offense shall have been committed if the accused shall have been apprehended in said district, or if the accused shall have been brought into said district, provided he shall have been apprehended out of the Island of Cuba."

IV.

Of the legislative history of the Act of June 6, 1900, under the provisions of which the appellant is restrained of his liberty.

On the 6th day of May, 1900, the appellant, who had returned to the United States on leave of ab-

sence on the 28th of April (Record, p. 16 [31-32]) was "indicted" in the City of Havana, in the Island of Cuba, for the crime of "embezzlement of public funds" to the amount of "ten thousand dollars and upwards," in violation of "Chapter X., Article 401 of the Penal Code,"* "an order being then and there regularly and duly entered to that effect by the Judge of the Court of the First Instance and Instruction of the Cathedral District of the City of Havana."

Transcript of Record, pp. 9–10.

On the same day the Judge in Havana directed that the appellant "should be arrested and that proper request should be made for his extradition."

Ibid., p. 10.

On the 18th day of May, 1900, the appellant was again "indicted" in Havana for the crime of "malversation of public funds" "to the amount and value of more than fifty-seven thousand dollars in gold coin of the United States currency," in violation of "Sections 37 and 55 of the Postal Code of the said Island of Cuba," alleged to have been committed "between the dates of July 1, 1899, and May 1, 1900."

Ibid., pp. 10–11.

On the same day (May 18, 1900) Major-General Leonard Wood, U. S. V., Military Governor of the Island of Cuba, addressed to the President a request for the appellant's extradition upon the latter charge.

Ibid., p. 11.

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* The Penal Code of Cuba and Porto Rico (*Codigo Penal para las Islas de Cuba y Puerto Rico*) was promulgated by a Spanish royal decree (*Royal Decreto*) of May 23, 1879. It was a revision of the Penal Code of June 17, 1870, and was undertaken upon the conclusion of the "Ten Years' War" in Cuba. Article 401 provides that: "The public employee who, by reason of his office, has in his charge public funds or property and who should take (or consent that others should take) any part therefrom, shall be punished," &c. (See Post, pp. 175–178).

At this time there was no treaty stipulation or act of Congress authorizing the appellant's extradition to Cuba.

On the 18th of May (the same day the Military Governor issued his requisition for the appellant's surrender on the charge of violating the "Postal Code"), two bills were introduced in the House of Representatives (56th Congress, 1st Session, H. R., 11,709 and 11,710).

The first was a proposed amendment to Section 5270 of the Revised Statutes, by way of a proviso authorizing the extradition of offenders against the criminal laws, orders, rules or regulations lawfully established by the United States, or its officers, or any department thereof, for the control or government of any foreign country or territory under the control or temporary government of the United States over which the United States had authorized or established governmental control.

The other (11,710) was introduced "*by request*."*

Section 1 provided

> "that sections 5270, 5271, 5272, 5273, and 5274 of the Revised Statutes, and all other statutes of the United States covering extradition to foreign countries in pursuance of treaties, shall apply to and govern extradition to the Island of Cuba while occupied by the United States, and during the continuance of the government maintained and established in said island by the United States, in the same manner and to the same effect as

* This bill was prepared by the Attorney General and had been submitted by him to the chairman of the House Committee on the Judiciary, by whom it was introduced, accompanied by a letter from the Attorney-General, in which the latter said: "Recent offenses of a criminal nature committed by an employee of the postal service in Cuba, who has fled from justice there and taken refuge in the United States, make it my duty to call your attention to the fact that the application of the present extradition laws of the United States to such cases is in a condition of doubt and uncertainty which makes it embarrassing to the Department of Justice," &c. "I have drafted an act which will make the course of procedure in such matte s sure and certain, and I respectfully ask that it be considered by your committee, and, if found expedient, that it be introduced and passed as speedily as possible."

though Cuba were a country with which a treaty existed stipulating and providing for extradition in the case of all felonies and other crimes, past and future, against the penal code or the laws in force in the island of Cuba, and in the same manner as if the governor or other chief officer of Cuba were the head of an independent government thereof."

SEC. 2 made it a misdemeanor to obstruct, resist, or oppose any agent, person, or officer having a prisoner in custody under the provisions of the section in the execution of his duties, or to rescue or attempt to rescue such prisoner.

By SEC. 3 it was proposed to make the provisions of sections 5278 and 5279 of the Revised Statutes apply to the rendition of fugitives from justice "between the several States and Territories of the United States and the several islands belonging to the United States by virtue of the Treaty of Paris."

On the 19th of May a bill was introduced in the House (H. R., 11,719) which was the framework of the statute as it was eventually enacted.

The three bills were referred to the House Committee on the Judiciary, which on the 22d of May reported the bill last mentioned with an amendment in the nature of a substitute. In the course of its report the committee said:

> The extradition laws of the United States provide for the removal to a foreign jurisdiction for trial of a person who has committed a crime in a foreign country or territory and fled from justice therein to the United States in those cases only where a treaty providing for extradition is in existence between the United States and such foreign country.
>
> Conditions have arisen demonstrating the necessity for additional legislation on this subject and the enactment of a law providing for the removal of such persons to a foreign country or territory for trial under the laws there in force when such foreign country or territory is occupied by the United States,

and therefore under its government or control, even though no treaty exists and such foreign country has no government competent to make a treaty. * * * Your committee therefore report the bill back with the recommendation that it pass when amended as follows: Strike out all after the enacting clause and insert the following:

That section fifty-two hundred and seventy of the Revised Statutes of the United States is hereby amended by adding thereto the following proviso:

"*Provided*, That whenever any foreign country or territory, or any part thereof, is occupied by the United States, any person who shall violate, or who has violated, any of the criminal laws in force therein, and who shall depart or flee, or who has departed or fled, from justice therein to the United States, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the authorities in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern proceedings authorized by this proviso: *Provided further*, That such proceedings shall be had before a judge or a justice of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged. If so held, such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall guarantee to such person a fair and impartial trial."

56th Congress, 1st Session, House Report No. 1652.

Meanwhile, on May 21st, two bills were introduced in the Senate and referred to the Committee

on the Judiciary. One of these (S. 4800) was introduced by Senator Fairbanks and the other (S. 4802) by Senator Hoar.

The measure proposed by Senator Fairbank was entitled "A Bill to require the President to cause to be surrendered to the governing authorities of Cuba, or any possessions of the United States, fugitives from justice, and for other purposes." It applied, as its title indicated, to fugitives charged with any offenses against the criminal laws of *Cuba*, *or* any of the *possessions* of the United States." It further provided for the surrender, on the request of the President, of fugitives found in Cuba or United States possessions. The act was to be applicable to Cuba only so long as the same should be "governed by United States authority."

Senator Hoar's bill applied to Cuba while that island should remain "under the authority of the United States." It enumerated the offenses for which extradition might be granted, and concluded with the following proviso:

> "That before making such order for surrender and return the Judge shall be satisfied that proper provision exists to secure to the defendant a fair trial for such offense before a civil judicial tribunal, where he will be represented by counsel; that the offense with which he is charged will be fairly and distinctly described to him, and that he will have an opportunity to be confronted at his trial with the witnesses against him."

On the 23d of May the bill (No. 11,719), in the form in which it had been reported by the House Committee on the Judiciary, was debated in the House of Representatives and passed.

Cong. Rec., p. 6365.

It was subsequently referred to the Senate Committee on the Judiciary.

Cong. Rec., p. 6402.

On the 28th of May that committee reported it back, with an amendment in the form of a substitute which confined its operation to the Island of Cuba. The substitute also incorporated the proviso (above quoted) from Senator Hoar's bill relative to a speedy and fair trial, &c.

Cong. Rec., pp. 6606, 6961, 6966-7, Senate Report No. 1515.

In its report the committee said (among other things):

> "There is no existing law under which a man may be arrested for an offense committed in the island of Cuba.
>
> There exists no extradition treaty between the United States and Cuba under which fugitives from justice may be detained and returned to the island for trial and punishment. * * * Our fiduciary relations to Cuba are of such a singular and exalted character that we should be quick to provide all necessary means for making effective laws which are operative in the island. It would indeed be idle for the military authority to provide or sanction a criminal code for the island if criminals could escape to the United States and no means be afforded for their apprehension and return to the proper jurisdiction, there to answer the charges standing against them. * * * We could not in good conscience, and with a just regard for the interests of the island within our control, and the interests of society, refrain from enacting a suitable statute of rendition and surrender.
>
> In order that there may be no vexatious exercise of the power of extradition under this act, it is provided that there shall be shown probable cause before a judge of the appropriate court who shall order the return and surrender, but no such order shall be made until the judge shall be satisfied that the accused will have a speedy and fair."

The amended bill, as thus reported, was further amended by the Senate by striking out the proviso relative to a fair and speedy trial (and in other but

less important respects), and, as thus amended, was passed by the Senate June 2d.

Cong. Rec., pp. 6722, 6955, 6961, 6970.

The House having failed to concur in the Senate amendments, and the Senate insisting upon its amendments, a Conference Committee was appointed.

Ibid., pp. 7172, 7188.

On the 5th of June the Conference Committee submitted a report recommending the passage of the bill in its present form. The report was agreed to by both Houses, and the measure, as enacted, was approved by the President the following day.

Ibid., pp. 7234, 7257, 7312, 7386, 7388.

The history of the bill in Congress and an examination of the debates in the Houses can leave no possible doubt that the act was passed for the express purpose of enabling the extradition of the appellant.

Ibid., pp. 6365-6372, 6961-6969.

V.

Of the appellant's arrest and the proceedings before the Circuit Judge

On the 13th of June, 1900, the Military Governor (who, as we have seen, had issued his requisition for the appellant's surrender nearly a month before), made a second requisition upon the President for his extradition, this time specifying the alleged embezzlement or "malversation of public funds" in violation of the Penal Code of Cuba, as the basis of his demand.

Record, p. 10.

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On the 27th of June two complaints were laid before the Circuit Judge, charging the appellant with the supposed offenses against the "laws in force in Cuba" specified in the two requisitions, and for which, as appears above, the appellant had been "indicted" in Havana.

Ibid., pp.

Both complaints are made "on information and belief," by Ernest E. Baldwin, as Assistant United States Attorney in and for the Southern District of New York, and in addition to the allegations setting forth the nature of the supposed offenses, they aver that the appellant "is a fugitive from justice * * * and is now within the territory of the United States of America, to wit, in the City of New York, in the Southern District of New York"; that the crime specified in each "is an offense within the meaning of the Act of June 6th, 1900"; that the island of Cuba is "a foreign country occupied by and under the control of the United States"; that the appellant had been theretofore declared to be "indicted," and that the Military Governor had issued his requisitions for the appellant's extradition, as above stated.

Petition, Exhibit A, pp. 8-9; Exhibit B, pp. 9-10.

At this time the appellant was in the custody of the appellee under an order of arrest issued in a civil action for conversion brought by the United States.

Petition, p. 7 (14).

Two separate warrants for the appellant's arrest, addressed "to the Marshal of the United States for the Southern District of New York, his deputies or either of them," were thereupon issued by the Circuit Judge. The language of the warrants is identical (except as to the recital of the offenses, in which respect they correspond to the complaints), and each commands the Marshal

"forthwith to take him, the said Charles F. W. Neely, and bring him before me, the said Judge, in order that the evidence of probable cause as to the guilt of the said Charles F. W. Neely of the offense charged against him may be heard and considered, and, if deemed sufficient, that the same may be certified, with a copy of all the proceedings, to the Secretary of State, that an order may issue for the return and surrender of the said Charles F. W. Neely pursuant to the authority of the said act of Congress."

Petition, Exhibit C. pp. 10-11; Exhibit D., pp. 11-12.

On the 29th day of June, the appellant having been taken into custody and brought before the Circuit Judge by the Marshal under the warrants, counsel for the appellant moved for a dismissal of the complaints, and for his discharge, upon various grounds, and among others:

First.—That the act of June 6, 1900, was unconstitutional and void, and conferred no jurisdiction upon the Circuit Judge; that there was no power in Congress, under the Constitution of the United States, authorizing the enactment of the measure; that the same was not a necessary or appropriate instrumentality for carrying into effect or executing any of the known powers of Congress; that the Act, if applicable to the defendant and to the situation set forth in the said complaints, would enable an American citizen to be subjected to the jurisdiction of a military government maintained by the President of the United States in friendly foreign territory in time of absolute peace; that no authority for such military government exists or can exist under the Constitution of the United States; and that the Act sought to aid the military branch of the United States Government in the maintenance and execution of an illegal and unwarranted usurpation of the sovereignty of the Cuban people.

Second.—That neither of the complaints charged the appellant with having committed an offense against any law in force in foreign

territory lawfully occupied by or under the control of the United States.

Petition, pp. 1–2.

The motion was denied* and a hearing ensued, which was continued by due adjournments to and including the 24th day of July. Evidence on the part both of the Government and the appellant was introduced. On the last mentioned day the case was submitted to the Circuit Judge for his decision.

Petition, p. 2.

The testimony is not to be found in the record, and it is immaterial. The evidence procured by the Military Governor to establish "probable cause" of the appellant's guilt, cannot affect the question of the jurisdiction of the Circuit Judge, whose sole authority for entertaining the extradition proceedings was the Act of June 6, 1900. If that act is unconstitutional it is not a law. It is, in legal contemplation, as inoperative as though it had never been passed, and the extradition proceedings must fall with it.

Norton *v.* Shelby County, 118 U. S., 442.

On the 8th of August the Circuit Judge handed down a written memorandum, wherein he stated that in his opinion the Government had shown probable cause to believe the appellant guilty of the offense of "embezzlement or criminal malversation of the public funds," he being a "public officer" or "employee" or "depositary"; that such an offense was obnoxious to the Penal Code of Cuba, and was a violation of the criminal laws there in force, and was also an offense defined in the Act of June 6, 1900, and that upon such evidence the appellant would be held for extradition.

Petition, p. 2; Exhibit E, pp. 12–15.

* The Circuit Judge filed a written opinion upholding the constitutionality of the Act, copies of which will be furnished the Court.

The memorandum concluded with this paragraph:

> "Two obstacles to his extradition now exist. He has been held to bail in this Court upon a criminal charge of bringing into this district government funds embezzled in another district. He has also been arrested in a civil action brought in this Court to recover $45,000, which, it is alleged, he has converted. When both of these proceedings shall have been discontinued, the order in extradition will be signed. This may be done on August 13th, at 11 A. M."
>
> *Ibid.*, p. 15.

VI.

Of the appellant's application for a writ of habeas corpus, its denial by the Circuit Court, and the appeal from the order denying the same.

Before any order in extradition had been signed, and before the other proceedings referred to by the Circuit Judge had been discontinued, and while the appellant was still in the custody of the appellee under the warrants in the extradition proceeding, to wit, on the 9th day of August, an application was made to the Circuit Court on his behalf for a writ of *habeas corpus*.

Petition, p. 7; Order, p. 17.

The petition, after setting forth the proceedings before the Circuit Judge, alleges that the appellant's arrest and detention in the extradition proceedings are without authority of law, and in violation of his rights, privileges and immunities under the Constitution and laws of the United States, the Act of June 6, 1900, being unconstitutional and void.

Ibid., p. 3.

The grounds upon which this contention is based are thus specified in the petition:

"1. That the people of the island of Cuba are and at all times since the month of April, 1898, have been free and independent, and that the said island is a foreign country, regarding whose government or affairs Congress cannot competently legislate, and in whose internal affairs the United States cannot lawfully interfere.

2. That by the joint resolution of Congress adopted April 19, 1898, and approved by the President the following day, the political branch of the Government of the United States found and determined as matter of fact that the Cubans had a government of their own, capable of performing the duties and discharging the functions of an independent nation, and having all the forms and attributes of nationality, entitling them to take and maintain a place in the great family of nations, and that such finding and determination of fact are absolutely binding and conclusive upon the judicial branch of the United States Government.

3. That the status of Cuba and of the people of Cuba as a free and independent nation has at all times since the adoption and approval of the said joint resolution remained, and yet does remain, unchanged.

4. That at the time of the adoption and approval of the said resolution a state of war existed between the people of the island of Cuba and the government of the Kingdom of Spain; various portions of the territory of the Cuban people were invaded by the Spanish forces, and certain parts thereof were occupied and controlled by such invading forces, and that by the adoption and approval of said joint resolution, and upon the adoption and approval of the same, the United States became the friendly ally of the Cuban people in its said war with Spain, and throughout the ensuing hostilities, and until the termination of the said war; the allied forces of the Cuban people and of the United States jointly waged war

against the government of the Kingdom of Spain.

5. That the said war had been wholly terminated and was at an end on or about the 1st day of January, 1899, at which time all the invading Spanish forces had evacuated the island of Cuba.

6. That at no time since the 1st day of January, 1899, has there existed a state of war between the Government of the United States and the Kingdom of Spain; that there has never existed a state of war between the United States and the Cuban people, but, on the contrary, the United States and the Cuban people have at all times during the existence of the latter as an independent nation been on terms of perfect peace and amity.

7. That during the latter part of said war and until peace was established, a part of the Army of the United States, consisting of several thousand officers and soldiers, was stationed in Cuba, and, in co-operation with the army of the Cuban people, conducted in the said island various military operations in the prosecution of the war and for its successful conclusion.

8. That on the 13th day of December, 1898, the Secretary of War of the United States made and issued an order wherein and whereby, by direction of the President, a division to be known as the Division of Cuba, consisting of the geographical department and provinces of the said island of Cuba, with headquarters in the city of Havana, was created under command of a major general of the United States Army, who, in addition to command of the United States troops in the said division, was by the said order directed to exercise the authority of military governor of the said island.

9. That when the said war was at an end and the island of Cuba pacified, and actual peace existed there, the said military forces of the United States being still stationed in Cuba, the President of the United States, as the Commander-in-Chief of the Army of the United States, instead of withdrawing the

army from the said island, and leaving the government and control thereof to the Cuban people, kept and continued the army and yet does keep and continue it there.

10. That thereupon the President, as such commander-in-chief, set up and established in the said island a military form of government, to wit, a government thereof by martial rule, and at all times since the said 1st day of January has there maintained, and yet does maintain, such military government in the island of Cuba and over the affairs of the Cuban people, thereby usurping and entirely suspending the government and control of the island by its people and substituting in its place martial rule.

11. That at all times since the said 1st day of January, 1899, the President of the United States has maintained such martial rule in Cuba, and throughout the territory of that island, through a military governor appointed by him, and by force of the army under his command.

12. That the said military governor assumes to exercise and has ever since the said 1st day of January, 1899, actually exercised absolute executive, legislative, and judicial power over the affairs of the island of Cuba and over the Cuban people and rules the same by his sole and uncontrolled will, subject to no superior authority save that of the President of the United States as Commander-in-chief of the United States Army.

13. That in the exercise of such martial rule the military governor has taken it into his hands and has subjected and now subjects to his absolute authority all the departments of government in that island. He assumes and actually exercises absolute power and authority, not only over the persons and property of the citizens of Cuba, but over the persons and property of all persons in the island there resident, or mere sojourners, and whether citizens of Cuba, or of the United States, or of any other nation, to the same extent and in the same manner as though Cuba were hostile foreign territory in the military occupation of

the United States in time of war and the United States were an invader or conqueror of territory belonging to an enemy nation, and were entitled to exercise the power of belligerent right. He assumes to enact, modify, amend, or repeal laws, establish, reorganize, or abolish courts, civil and criminal; adopt or change rules of judicial procedure, and in general to deal with the administration of justice in the island as he sees fit.

14. That on the said 1st day of January the said military governor published a proclamation addressed "To the people of Cuba," wherein and whereby he declared (among other things), that the civil and criminal code which prevailed in Cuba prior to the relinquishment of Spanish sovereignty would remain in force, with such modifications and changes as might from time to time be found necessary in the interest of good government.

15. That on the 11th day of January, 1899, he issued a military edict or order, whereby he ordered that thereafter the civil government of Cuba should be administered by four departments, to be known as the department of state and government, the department of finance, the department of justice and public instruction, and the department of agriculture, commerce, industries, and public works, each under the charge of a secretary; and on the following day he caused to be published an announcement of the appointment by him of secretaries of such departments.

16. That on the 14th day of April, 1899, he caused to be published a military order creating a supreme court, with jurisdiction throughout Cuban territory, composed of a president or chief justice, six associate justices, one fiscal, two assistant fiscals, one secretary or chief clerk, two deputy clerks, and other subordinate employees, with administrative functions, as well as those of a court of justice in civil and criminal matters.

17. That by article XXXVII of the same order he declared that to be eligible for appointment to the office of president, justice, fiscal, assistant fiscal, or deputy clerk of the

supreme court the person must (among other things) be a Cuban, or declare on oath that he accepts Cuban citizenship, provided he be a person included within the provisions of article 9 of the 'Treaty of Paris of December 10th, 1898.'

18. That on the 15th day of June, 1899, he issued a military edict or order whereby he declared that thereafter the '*audiencias*' of the island of Cuba should be organized and should excercise jurisdiction in accordance with the provisions of the said last-mentioned edict or order.

19. That by article XLI of the same order he declared article XXXVII (before mentioned) of the order creating the supreme court applicable to the functionaries of the '*audiencia*.'

20. That the supreme court, the '*audiencias*,' and certain tribunals called 'courts of first instance,' are at present the only courts in Cuba exercising or assuming criminal jurisdiction; that all of said courts are at present organized, controlled, and operated by the military governor, who assumes power to appoint, suspend, and remove their members, officers, and employees at his pleasure.

21. That said said courts act as the mere agents and instruments of the mililtary governor and are wholly dependent for their existence and continuance upon his will.

22. That under the military system now in force there is no means of trying offenders against the laws in force in Cuba (if any there be) except through the instrumentality of said courts or such other courts as the military governor may see fit to erect.

23. That there is no authority in the Constitution of the United States for the occupation or control by the United States of the territory of a friendly foreign nation, or for the government of such foreign territory by the United States by martial law, or otherwise, in time of peace, and that the form of government now maintained by the United States in Cuba is wholly illegal and without authority under the Constitution of the United States.

> **24.** That there is no authority in the Constitution of the United States for the exercise by the United States military authorities, through the President, as commander-in-chief, or otherwise, of jurisdiction over United States citizens who are civilians and not commissioned or enlisted in the military service, even in time of war, except in hostile territory in the forcible military occupation of the United States forces; and that in time of peace neither martial law nor military jurisdiction of any kind can lawfully be employed or exercised by the United States authorities as against civilian citizens even in the United States, much less in friendly foreign territory."
>
> Transcript of Record, pp. 3 6.

The petition alleges that the Act of June 6, 1900, is therefore unconstitutional and void in that —

> (*a.*) There is no authority in the Constitution for its enactment by Congress, the legislative power granted to Congress by the Constitution not extending to the enactment of any such measure.
>
> (*b.*) It seeks to aid the President of the United States, and the military governor appointed by him, in the maintenance in foreign territory, in time of peace, of an unlawful and unauthorized military jurisdiction.
>
> (*c.*) It seeks to give legal countenance and support to an unwarranted and unjustifiable invasion by the United States military forces of the territory of a friendly foreign power, and the wrongful usurpation of the functions of a sovereignty belonging to such foreign nation.
>
> (*d.*) It seeks to subject American citizens who are civilians and not in the military service to martial rule in time of peace.
>
> *Ibid.*, p. 6.

It is averred, in conclusion, that the act conferred no jurisdiction upon the Circuit Judge to entertain the extradition proceedings or to issue the warrants; that the warrants were issued without legal right,

authority or jurisdiction of any kind, and are utterly void and ineffectual, and that the appellant's arrest, detention and imprisonment thereunder are in violation of the Constitution of the United States, and of his rights, privileges and immunities thereunder.

Ibid., p. 7.

The application was denied (p. 17), and from the final order of the Circuit Court thereupon entered, an appeal to this Court was duly allowed (pp. 19-20), pending the determination of which the appellant has been remanded to the custody of the appellee (p. 18).

ERRORS ASSIGNED.

In denying the application the Circuit Court decided that it appeared from the petition itself that the appellant was not entitled to the writ.

U. S. Rev. Stat., Sec. 755.

In other words, the Court below held that, admitting the truth of all the allegations of the petition, the Act of June 6, 1900, was nevertheless a valid exercise of the legislative power of Congress, and that the appellant was lawfully detained in the proceedings instituted under it.

This decision was in effect a judicial determination that the President had authority under the Constitution to occupy and control the Island of Cuba, and to establish and maintain a military government in that island; that the present military government established and there maintained by the President is warranted and sanctioned by the Constitution, and, in short, that it was competent for Congress to enact the statute in question, and thereby to secure the reclamation from the United States of persons charged with criminal offenses in Cuba, in order to subject them to prosecution in the tribunals administering the judicial system there in vogue.

The following errors are specifically assigned:

"The court erred:

1. In denying the petitioner's application for a writ of *habeas corpus*.

2. In refusing to grant the said application.

3. In deciding that it appears from the petition itself that the relator is not entitled to such writ.

4. In holding that the petitioner is lawfully held in custody under the warrants of arrest issued under the act of Congress passed June 6, 1900, entitled 'An act amending section 5270 of the Revised Statutes of the United States.'

5. In holding that the enactment of said act of Congress was a valid exercise of the legislative power vested in Congress by the Constitution of the United States.

6. In holding that the United States or the President of the United States, or any officer, department, or branch of the United States Government, has authority under the Constitution of the United States to occupy or control the territory of a friendly foreign nation, or any part thereof, in time of peace, or to establish a military government therein, or to rule the same by martial law or otherwise.

7. In holding that the present government established by the President of the United States in the island of Cuba is warranted or sanctioned by the Constitution of the United States.

8. In holding that the President of the United States or the military authorities thereof, or any department of the United States Goverment, has authority under the Constitution of the United States to govern the island of Cuba or to interfere in any way or to any extent with the internal affairs of said island.

9. In holding that the President of the United States or the military authority thereof, or any other department of the United States Government, has authority under the Constitution of the Un ted States to establish or enforce the judicial system now in operation in the island of Cuba or any executive, legislative, or judicial authority therein.

10. In holding that the courts established by the military government of the island of Cuba and now in operation there have any legal existence.

11. In holding that the so called 'postal code' of the island of Cuba has any legal force or effect.

12. In holding that American citizens may, under the provisions of the Constitution of the United States, be lawfully extradited to Cuba for trial therein in the courts now existing in said island.

12. In holding that under the Constitution of the United States, Congress may subject a citizen of the United States, not enlisted or commissioned in the military service of the United States Government or subject to the articles of war and the rules and regulations of the United States Army, to martial law in time of peace.

14. In holding that Congress has power under the Constitution of the United States to authorize the extradition of an American civilian citizen in time of peace to a country occupied by the United States and governed by martial law by the President, as the Commander in chief of the United States, in order that such citizen may be there tried by a tribunal created by the United States military authorities.

15. In holding that under the Constitution of the United States the island of Cuba or any part thereof is now or has been at any time lawfully occupied by or under the control of the United States.

16. In holding that there is any right or power in the authorities at present in control of the island of Cuba to secure to any person a fair and impartial trial in Cuba within the spirit and meaning of the United States Constitution.

17. In holding that under existing conditions a person extradited to Cuba can there secure or be accorded a fair and impartial trial within the spirit and meaning of the United States Constitution.

18. In holding that there was evidence before the circuit judge in the proceedings which resulted in the petitioner's commit-

ment, establishing or tending to establish that he was or had ever been guilty of a violation of any criminal law in force in Cuba by the commission of one or more of the crimes specified in the said act of Congress."

Record, pp. 23–24.

BRIEF OF THE ARGUMENT.

FIRST.—The present case involves the construction and application of the Constitution of the United States within the meaning of Section 5 of the Act of March 3, 1891, and was properly brought here directly from the Circuit Court.

It is necessary to determine whether Congress has power under the Constitution to seize an individual in the United States and cause him to be sent to a foreign place where, in time of absolute peace, the President has set up and is maintaining a military government, which is administering (as the Military Governor has said, see *ante*, p. 65):

> "a system of laws with which Americans are entirely unfamiliar, and which would not be tolerated in any American community,"

in order that such individual may be there subjected to the jurisdiction of that government.

SECOND.—The fact that the appellant is detained by the appellee by virtue of process in a civil suit as well as under the warrants issued pursuant to the Act of June 6, 1900, does

not deprive him of the right to test the legality of his detention under the latter.

The appellant contends that he is illegally restrained of his liberty under the warrants issued in the extradition proceedings, and he asks to be released from custody only so far as he is held under those warrants.

If such restraint were removed he might, *non constat*, furnish a proper undertaking in the civil suit, and thus secure his release from confinement. In any event that confinement will eventually terminate at the same place where it began.

But there is no prospect or means of release in the extradition proceedings. The law contains no provision for bail. Unless the present appeal prevails, the appellant will be sent to Cuba, where he will be subjected to the jurisdiction of military tribunals, whose proceedings this Court has, perhaps, no power to review.

Matter of José Juan Vidal *et al.*, Nov. 12, 1900.

This Court has already had occasion to consider a similar situation, and although the question as to whether, where the petitioner is held under legal as well as illegal process he is entitled to obtain his release from the latter by *habeas corpus*, was apparently not raised, this Court did in fact order his discharge in so far as he was illegally detained, without regard to the other and legal detention.

In Coleman *v.* Tennessee, 97 U. S., 509, the plaintiff in error was held by the Sheriff of Knox County, Tennessee, upon a *capias* for the offense of murder, and *also* upon an indictment for assisting a prisoner in making his escape from jail. There was no claim made that he was not lawfully held upon the latter charge. The conviction for murder having been affirmed by the Supreme Court of the State, the United States Circuit Court on *habeas corpus* "being

of opinion that *so far as the defendant was held under the charge of murder*, he was held in contravention of the Constitution and laws of the United States, ordered his release from custody on that charge" (p. 512).

The Supreme Court of Tennessee having held that the order of the Circuit Court was a nullity, and refused to discharge the defendant as directed, the case was taken to this court by writ of error, where the judgment of the Supreme Court of Tennessee was "reversed, and the cause remanded with directions to discharge the defendant from custody by the Sheriff of Knox County *on the indictment and conviction for murder* in the State Court" (p. 519).

In the case at bar, the appellant contends that so far as he is held under the warrants issued under the Act of June 6, 1900, he is held in contravention of the Constitution and laws of the United States, and under the precedent of the case cited, this Court is asked to reverse the order of the Circuit Court, which denied his application for relief, and to direct his discharge from custody under those warrants.

THIRD.—The political status of the Island of Cuba at the time of the passage of the Act of June 6, 1900, was that of a free and independent power.

The status of Cuba at the time the act here under consideration was passed, and at the present time, is a question of material importance in this case. If the Island of Cuba was and is a "foreign territory occupied by or under the control of the United States," the act, provided it is a valid enactment, authorizes the appellants' surrender to the President's military representative in the Island in order that he may be there tried for alleged offenses

against the laws which it is claimed are there in force.

If, on the other hand, Cuba is not "foreign territory" but a place within the sovereignty and jurisdiction of the United States, then, of course, the act has no application to the present case, and the question as to whether or not it may be enforceable when foreign territory *is* in the possession of our military forces need not be considered.

(*a.*) The question, however, is one of fact, exclusively within the jurisdiction of the political branch of the Government, and not for this court, which by an unbroken line of authorities must accept as final and conclusive the determination arrived at by the political branch.

As long ago as Gelston *vs.* Hoyt, 3 Wheaton, 246-314, Judge Story said:

> "No determination is better established than that it belongs exclusively to governments to recognize new States in the revolutions that may occur in the world, but until such recognition either by our own Government or the government to which the new State belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered."

(*b.*) By the terms of the Constitution, and by the uniform practice thereunder, the authority to recognize a new power is vested in the Executive, that is to say, in the President alone, or in the President and the Senate.

> See Senator Hale's Memorandum on the "Power to Recognize the Independence of a New Foreign State," 54th Congress, 2d Session, Senate Document No. 56.

Two points must be decided before the independence, or even the belligerency, of a foreign power is "recognized."

FIRST, whether the independence or belligerancy in fact exists; and

SECOND, whether it is advisable for the United States to take official notice of its existence.

A new nation may be, in fact, independent, yet its independence may not yet be recognized by the older nation from which it has separated itself. War may still be raging between them, and the recognition of the independence of the new nation may be regarded as a *casus belli* by the old one. National sympathy may be aroused in the United States to the extent of a willingness to go to war with the old nation for the sake of encouraging the new one. Such was the feeling of France toward the United States in the Revolutionary War, and of the United States toward Texas in 1837. National sympathy, on the other hand, may not be aroused with sufficient unanimity to justify the nation's agents, whether executive or legislative, to take such a step. The question may, therefore, be left to be decided partly by questions of expediency, and these questions are mainly diplomatic in methods of solution. It is the executive branch of the Government which is best qualified to judge whether recognition would be a *casus belli;* whether other neutral nations would join in it; whether it would jeopardize negotiations pending with the nation which would be expected to resent the recognition.

Ibid., p. 29.

These considerations, in themselves, show conclusively that the recognition of a foreign power belongs to the sphere of diplomacy, and, therefore, to the executive branch of the Government.

(c.) Congress has no power in the matter, further than to express to the Executive its sense of what political or diplomatic action will receive its support by way of subsequent legislation. Congress possesses purely legislative powers. It has no control

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over international law further than to enact that the rules of international law shall not be respected by the United States. Nor can it enact that something is a fact which is not a fact. It cannot make a foreign people independent, although it can enact that, for any specified purpose or purposes, it shall be regarded as independent by our executive department or by our Congress. Neither can Congress control international law, which is based upon the consensus of different nations. International law regards independence as a question of fact, and does not recognize it until it is a fact, irrespective of sympathy. Nor can the legislative branch of the Government hold any communications with foreign nations. The executive branch is the sole mouthpiece of the nation in communication with foreign sovereignties. Foreign nations communicate only through their respective executive departments. Resolutions of their legislative departments upon diplomatic matters have no status in international law. In the department of international law, therefore, properly speaking, a Congressional recognition of belligerency or independence would be a nullity.

All of these considerations were familiar to the statesmen who framed the Federal Constitution; and it is clear, from the terms of that instrument, that all findings of fact as to emergencies beyond the sea for purposes of international law and diplomacy were intended to be intrusted to the executive department exclusively.

Neither the legislative nor the executive branch of the Government is subordinate to the other. They are intended to be, and are, co-ordinate.

This is too familiar and elementary a doctrine of our constitutional law to require discussion here.

An examination, either of Congressional debates or of executive documents, from the beginning of the Government, will show the great care with which each of these departments has endeavored, with rare exceptions, not to infringe upon the province of the other, and in no instance is this more

clearly shown than in the debates upon the power to recognize a new foreign government, Congress on the one hand (except one House in 1864*) confining its action to proffers of advice or assistance, while the President, on the other hand, when any international complication from such recognition seemed probable, so that recognition would involve contingencies requiring legislation, would ascertain the wishes of the legislative branch of the Government.

(*d.*) Before taking action the Executive may properly consult the Legislature, especially when recognition will naturally require legislative action.

Whenever affirmative action of either the executive or the legislative branch of the Government may involve a call upon the assistance of the other, the branch about to take action should, if possible, first obtain indications of the other's desires, because it is of the highest importance that these two independent and co-ordinate branches of the Government should be always in accord. For this reason Monroe consulted Congress before recognizing the independence of the South American Republics in 1822, and Jackson similarly consulted Congress before recognizing the independence of Texas in 1837, exactly as President McKinley consulted Congress before recognizing the independence of the Cubans.

> "While the legislative branch of the Government cannot directly exercise the power of recognizing a foreign government, because that is a power executive or judicial in nature (and one which the judiciary, by refusing independently to examine the question, cast entirely upon the executive), nevertheless, if a recognition of such independence is liable to become a *casus belli* with some other foreign

* December 19, 1864, the House of Representatives passed a resolution declaring that "Congress has a constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States, as well in the recognition of new powers as in other matters," &c. The Senate took no action in the matter.

power, it is most advisable, as well as proper, for the Executive first to consult the legislative branch as to its wishes, and postpone its own action if not assured of legislative approval."

Senator Hale's Memorandum, p. 2.

(*e.*) Recognition of a new State may be evidenced by any act fairly indicating an intention to recognize it.

16 Am. and Eng. Enc. L. (2nd Ed.), p. 1127.

"Recognition may be effected in very various ways. The most formal mode is by express declaration issued separately, and addressed to the new state, or by a like declaration included in a convention made with it. * * * But any act is sufficient which clearly indicates intention."

Hall's International Law, 4th Ed., Sec. 26, p. 92.

(*f.*) It will not be denied by any one that up to the time of the American intervention in the struggle between Spain and the Cuban insurgents, the Island of Cuba was one of the colonial possessions of the Spanish monarchy, and that at no time prior to that time had this Government disputed the complete sovereignty and dominion of Spain throughout that island.

(*g.*) It is now a part of the history of the world that from early in 1895 a civil war had prevailed in Cuba. The existence of this war, as a fact, was repeatedly recognized by Presidents Cleveland and McKinley, though neither party to it was formally recognized as a belligerent. The effect of the war from a legal and public standpoint is well known:

"A civil war breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other

as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies."

Vattel, 425.

The parties to the war stand in precisely the same predicament as two nations who engage in a contest, and, being unable to come to an understanding, have recourse to arms.

Ibid.

"But it is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claim sovereign rights as against the other. Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents and the contest a war."

Justice Grier in the Prize Cases, 67 U. S., 635, 666-667.

(*h.*) The executive department of our Government, long before intervention took place, had knowledge of the existence of the Cuban insurrection, and the fact that such an insurrection, constituting a civil war of unusual proportions, prevailed in that island, had been frequently made the subject of communications by the President to Congress.

On the 11th of April, 1898, after the series of events which we have already outlined, the Presi-

dent deemed it his duty to present the situation, which had then reached such an acute stage as to require executive action of some sort, to Congress, and to invite from that body expression of its wishes and desires in the matter.

In his message, the President advised against the recognition of Cuban independence.

After quoting from President Jackson's message of December 21, 1836, on the subject of the recognition of the independence of Texas, wherein he referred to the "long established policy of our Government" to defer recognition of the independence of a new government "until the lapse of time, or the course of events shall have proved beyond cavil or dispute the ability of the people of that country to maintain their separate sovereignty, and to uphold the government constituted by them," he continued:

> "These are the words of the resolute and patriotic Jackson. They are evidence that the United States, in addition to the test imposed by public law as the condition of the recognition of *independence* by a neutral State (to wit, that the revolted State shall 'constitute in fact a body politic, having a government in substance as well as in name, possessed of the elements of stability,' and forming *de facto*, 'if left to itself, a State among the nations reasonably capable of discharging the duties of a State'), has imposed for its own government in dealing with cases like these, the futher condition that recognition of independent statehood is not due to a revolted dependency until the danger of its being again subjugated by the parent State has entirely passed away."

Congress disagreed with the President as to the policy and propriety of recognizing the independence of the Cubans. It decided not only that the people of Cuba had a stable government, and possessed all the elements of sovereignty entitling them to take their place in the great family of na-

tions, but also that all danger of their being again subjugated by Spain had entirely passed away.

See Report of Senate Committee on Foreign Relations, 55th Congress, 2nd Sess., Senate Report No. 885.

The passage of the joint resolution and its prompt approval by the President followed.

(*i.*) The President thus receded from the position he had taken in his message of April 11th. The proceedings of Congress, and the facts as Congress viewed them, had apparently convinced him of the justice and right of the course which Congress advised.

He therefore promptly approved the resolution, and having thereby formally recorded his concurrence in the finding of the national legislature, he proceeded with earnestness and energy to enforce its requirements.

The approval of the resolution was followed by the President's demand upon the Spanish Government, and, upon its refusal to comply with that demand, by war measures on the part of the President, taken with the approval of Congress, consistent with the recitals of the resolution, and only justifiable by the facts therein declared to exist; and it is to be noted the resolution itself, and the declarations contained in it, were adopted as the justification and authority for every step thus taken by the President.

Message from the President, April 25, 1898, transmitting copies of correspondence, &c., showing the action taken under the joint resolution approved April 20, 1898. 55th Cong., 2d Sess., Senate Document No. 428.

(*j.*) If this action by the President, as the chief executive officer of the United States, upon its approval and in pursuance of the wishes of Congress

as expressed therein, constituted a recognition by the political branch of our Government of the independence of the Cuban people, this Court is precluded from any inquiry as to the truth of the fact thus recognized.

> "Who is the sovereign *de jure* or *de facto* of a territory is not a judicial but a political question, the determination of which by legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."
>
> Jones *vs.* U. S., 137 U. S., 202.

There is absolutely no ambiguity in the wording of the resolution. Language could not be plainer. It is declared in explicit terms that the people of Cuba "are, and of right ought to be, free and independent," just as the representatives of the insurrectionary American colonies declared on the 4th of July, 1776, "That these United Colonies are, and of right ought to be free and independent States," &c. It further declared the purpose of the United States to aid the Cubans in maintaining their independence. It demanded that Spain withdraw from the Island, and the President was empowered to use the entire land and naval forces to secure this object.

What is independence in a nation or a people?

The term of course implies that it is equally sovereign and independent within its territorial limits, and owes no kind of subjection to any potentate on earth; and when used in the resolution it meant that the people of the Island of Cuba were as free from the Spanish yoke as they were free from the dominion of all other powers, including the United States.

It is quite immaterial that it did not in express terms recognize the existence of a Cuban "Republic" or "government" in some formal manner, or declare it to be a "state," "nation" or "power."

The resolution itself was but one step in the pro-

cess of recognition. Its approval by the President constituted another step, and his subsequent action formally completed the incident.

Mindful that the act of formally recognizing the independence of a new power was the function of the Executive, and not of the National Legislature, and so that there might be no suggestion of usurpation on its part, Congress, as we have seen, eliminated the phrase "and that the government of the United States hereby recognizes the Republic of Cuba as the true and lawful government of the Island" (see *ante*, pp. 30, 32), which had no place in the resolution, and transmitted the measure to the President as the expression of its views and desires upon the subject, and that he might know that Congress was prepared to pass such legislation as his approval of the resolution, or its consequences, might require.

(*k*.) It may be that simple recognition *per se*, that is to say, a naked declaration of the fact of independence, accomplishes nothing, and that some act on the part of the Executive indicating a positive intention to recognize the new power is necessary before it can be regarded as having any legal or political effect. In judicial procedure a finding of fact, in order to have the effect of an adjudication, must be followed by a judgment which has the effect of requiring some person or persons to do or refrain from doing some thing or things. So a simple declaration of fact by the executive department may perhaps be directly operative only so far as it is, in effect, an announcement that certain action will be taken by the Executive under its constitutional powers.

But when it is followed, as was the approval of the joint resolution, by deliberate executive action which unmistakably assumes the truth of the fact thus declared and demonstrates the intention of the Executive to do so, there can be no question but that the act of recognition is complete.

(*l.*) This recognition of the independence of the Cuban people not only established the fact of their independence, but constituted a further finding of fact by the political branch of our government, which is equally conclusive upon this Court, that at the time their independence was acknowledged the people of that island had an established government of their own, and possessed all the powers and attributes of sovereignity entitling them to take and maintain a place among the nations of the world.

New states generally come into existence by breaking off from an existing State. In such cases a third power

> "is not justified in giving such recognition until independence is actually established, or while a substantial struggle to subdue the new State is being made by the parent country, but recognition is proper when the efforts to recover authority are so inadequate as to offer no reasonable ground for supposing that success may ultimately be obtained."
>
> Am. & Eng. Enc. L., Vol. 16, 2nd Ed., pp. 1128–1129.

John Quincy Adams, Secretary of State, writing to President Monroe in 1816, pointed out admirably the considerations of law, of morals, and of expediency which are involved in recognition:

> "There is a stage in such (revolutionary) contests when the party struggling for independence has, as I conceive, a right to demand its acknowledgment by neutral parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. It is the stage when the independence is established as a matter of fact so as to leave the chance of the opposite party to recover their dominion utterly desperate. The neutral nation must, of course, judge for itself when this period has arrived; and as the belligerent nation has the same right to judge for itself, it is very likely to judge differently from the neutral, and to make it a cause or pretext for war, as Great Britain did expressly

against France in our Revolution, and substantially against Holland. If war thus results, in point of fact, from the measure of recognizing a contested independence, the moral right or wrong of the war depends upon the justice and sincerity and prudence with which the recognizing nation took the step. * * * The fact and the right combined can alone authorize a neutral to acknowledge a new and disputed sovereignty."

Wharton's Dig. Int. Law, Sec. 70.

Without any previous recognition of the Cuban people as belligerents, the President declared their absolute freedom and independence.

Since this action would not have been permissible unless independence was actually established, it must be assumed that that condition did in fact exist. As independence implies an organized government and all the features of sovereignty, these must also be assumed to have existed.

The distinction between the recognition of the independence of a newly constituted government which separates itself from an old established nation, and the recognition of the existence of a civil war between such new government and the parent nation is obvious. In the latter case the very object of the contest is what the former determines to be already decided.

The action of our government in the case of Cuba was therefore a finding that the Cuban insurrection had succeeded, and that the Cuban people had effected, and were capable of maintaining the complete separation from Spanish sovereignty for which the insurrection was originated.

When, on March 8, 1822, President Monroe sent to Congress his celebrated message recommending the recognition of all the revolted colonies of Spain—Mexico, Colombia, Chile, and Buenos Ayres—Spain protested vigorously. The Spanish Minister in Washington urged that such action was an affront to morality and utterly inconsistent with the facts.

"Buenos Ayres," he said, was "sunk in the most complete anarchy;" in Peru, "near the

> gates of its capital," a rebel and a Spanish army divided the inhabitants; in Chile, "an individual suppresses the sentiments of its inhabitants;" "on the coast of Terra Firma, also, the Spanish banners wave;" "in Mexico, too, there is no government;" and he concluded, with force, "Where, then, are those governments which ought to be recognized?"

But Congress unanimously approved and adopted the President's views (as the President adopted and approved the views of Congress as expressed in the joint resolution of April 20, 1898), and,

> "although Mexico, Colombia, Chili and Buenos Ayres were in consequence admitted into the family of nations by the sole authority of the United States, with the approval of Congress, two years passed before the British Government consented even to discuss the subject in Parliament as a serious measure of policy."
>
> Report of Senator Cameron from the Committee on Foreign Relations, December 21, 1896, on "Recognition of Cuban Independence"; 54th Congress, 2d Session, Report No. 1160, pp. 13-15 *et seq.*

It will not be claimed that the recognition of the South American Republics was any the less a political finding of the fact of their independence, and of the further fact that they possessed organized governments of their own, because the existence of those facts was denied by the Spanish Minister. The fact was there conclusively established by the action of the Executive so as to prevent any judicial controversy on that point, precisely as the independence of Cuba, and the fact that at the time its independence was declared it had an established government, were conclusively determined when the President recognized those facts to exist.

The recognition of the independence or existence of a foreign state --

> " is well known to preclude any further inquiry by the judicial tribunals into the fact of their *due organization.*"
>
> Justice Woodbury in Scott *v.* Jones, 5 Howard, 374, citing Cherokee Nation *v.* Georgia, 5 Peters, 50, 59; United States *v.* Palmer, 3 Wheat., 634, and other cases.

(*m.*) The fact that the President did recognize, and intended to recognize, the fact of Cuban independence, precisely as that fact was declared in the joint resolution, is made evident by the language of the Treaty of Paris, which was drafted and negotiated by his own Commissioners, and throughout its entire length scrupulously followed the spirit, and, in some instances, almost the very words of the resolution. It does not follow that the treaty had such effect as was contemplated by the resolution. It may have constituted a political determination quite the reverse. Indeed, it may be argued that the terms of the treaty instead of recognizing Cuban independence very plainly deny it. If so, then it is clear that it at least fixes the status of Cuba, which, unless the joint resolution or some other political action on the part of the United States had that effect, remained Spanish territory until its conclusion and ratification. If it determined the fact otherwise than as we have argued, that determination may have a most important bearing on the case.

See pp. 173-174, *post.*

(*n.*) However, if the treaty was an assertion of the sovereignty of the United States in Cuba, *subsequent* legislation on the part of Congress and the President's approval of such legislation has destroyed its effect in that regard. We find that by the Act

of February 10, 1900 (*ante*, pp. 66-67) vessels owned by "citizens of Cuba" were accorded the rights and privileges of vessels of the "most favored nation," and the imposition of tonnage dues on Cuban vessels in excess of those prescribed by the Act of June 19, 1886, on vessels entering United States ports from any foreign port or place in * * * the West Indies was, by implication, declared illegal.

Surely, there could be no stronger evidence of a determination by Congress and the President that the ports of Cuba are foreign ports within the meaning of the international commerce and navigation laws.

(*o.*) The military administration of affairs in Cuba is not the act of the executive department, but of the President as commander-in-chief of the national forces. The assumption and exercise of such power and authority as he has seen fit to use in Cuba does not constitute in any sense a determination by the political branch of the Government as to the extent of the national domain and sovereignty.

The character of the administration and of the grounds upon which its legality will probably be asserted are considered at length in subsequent portions of this brief.

FOURTH.—Of the construction of the act of June 6, 1900, and the purpose and intent of Congress in its enactment.

> "In interpreting a law the motives which must have operated with the legislature in passing it are proper to be considered."
>
> *Ex parte* Milligan, 71 U. S., 2.

If any ambiguity exists it is proper to look to the "public history of the times."

Chief Justice Taney, in Eldridge *vs.* Williams, 3 How., 23-24.

The sole purpose of the act was obviously to provide a means of surrendering to the United States military authorities in Cuba, so long as the governmental affairs of that island should be administered by those authorities, persons there charged with the offenses specified in the act, in order that such persons might be tried in Cuba under the system there established and enforced by the military government.

This conclusion is the natural and inevitable result of the following considerations:

(*a.*) When the act was passed the Island of Cuba was foreign territory, if at that time there had been no political determination changing its status as fixed by the recognition of its independence.

When the word "foreign" is used in a Federal statute it means within the dominion of a foreign nation, *or* without the dominion of the United States.

> "The word 'foreign' means belonging to another nation or country; belonging to another jurisdiction."
>
> 13 Am. and Eng. Enc. L. (2d ed.), p. 830.

> "The primary and ordinary meaning of the term 'foreign,' is belonging to or relating to another sovereignty or dominion; as in the expressions 'foreign law,' 'foreign commerce,' 'foreign ministers,' '*foreign territory.*'"
>
> Brown, District Judge, in Bagley *v.* N. Y. and Porto Rico S. S. Co. (U. S. District Court, S. D., N. Y., Nov. 10, 1900). MSS. opinion, not yet reported.

"It is clear to my mind that a foreign port or place under the statute means a port or

> place exclusively within the sovereignty of a foreign nation. Such has been the uniform construction," &c.
>
> Story, *J.*, in *The Eliza*, 2 Gal., 4, 7.

In United States *v.* Hayward, *Ibid.*, 485, 500, the same distinguished jurist said:

> "By foreign ports, as the terms are here used, may be understood a port within the dominion of a foreign sovereign, and without the dominion of the United States."

See also

The Lark, 1 Gal., 55.
The Sally, Ibid., 58.
The Adventure, 1 Brock, 235.
Taber *vs.* United States, 1 Story, 1.
Loughborough *vs.* Blake, 5 Wheat., 317.

The term "foreign" is sometimes used in a more restricted sense in State legislation, as in such phrases as "foreign corporations," "foreign divorce," "foreign assignment," "foreign judgment," &c. But even then it retains its essential significance—namely, it refers to places without the jurisdiction of the particular State legislating.

A port or place in the hands of the enemy ceases to be domestic and becomes a foreign place for the time being, because it is no longer under the sovereignty of the United States.

United States *vs.* Hayward, 2 Gall., 500.
United States *vs.* Rice, 4 Wheat., 246.

It follows that if the Island of Cuba either (1) belonged to another power, or (2) was without the domain of the United States, it was "foreign territory" when the Act of June 9, 1900, was passed.

But the question has already been determined in the case of Betancourt *v.* Mutual Reserve Fund Life Association, where it was decided that a citizen of Cuba is a foreign citizen.

The action was upon an insurance policy and was brought in the Federal court by reason of diversity of citizenship. The Act of 1887 gives the Circuit Court jurisdiction of a controversy "between citizens of a State and *foreign States, citizens or subjects.*" The complaint averred that the defendant was a domestic corporation organized under and existing by virtue of the laws of the State of New York, and that having its principal office in the City of New York, and the plaintiff was a resident and inhabitant of the City of Matanzas, in the Island of Cuba, and a *subject and citizen of Cuba.* The demurrer asserted that the Court had no jurisdiction of the subject of the action. In overruling the demurrer, Judge Lacombe said:

> "The entire reliance of the demurrant appears to be upon the proposition that there is not the diversity of citizenship which the statute requires by reason of the fact that the plaintiff is a citizen of Cuba. Counsel does not maintain that plaintiff was not a foreign citizen before the breaking out of the war with Spain, nor that he ceased to be a foreign citizen when the joint resolution of April 20, 1898, was passed declaring that the people of the Island of Cuba 'are and of right ought to be free and indepeendent,' nor that the military occupation of Cuba by the forces of the United States in any way changed his *status.*
>
> It is contended, however, that in some way or other the treaty with Spain, of December 10, 1898, did, from the date of its ratification, remove him from the category of 'foreign citizens or subjects.' * * * There is certainly nothing in all this which lends any color to the proposition that the plaintiff is not a foreign citizen.
>
> Even the brief memorandum of opinion in Stuart *v.* City of Easton (156 U. S., 46) gives no support to demurrant's contention. One may be puzzled to determine upon what theory it was held in that case that a 'citizen of London, England,' is not a 'foreign citizen'; but assuming, as suggested, that it is because London is not a free and independent

community, but owes allegiance to the British crown, the decision has no application to the case at bar, since the political branch of this government has found as a political fact that the people of the island of Cuba 'are free and independent.'"

Betancourt *v.* Mutual Reserve Fund Life Assn., 101 Fed. Rep., 305.

(*b.*) At the time the act was passed the entire Island of Cuba was in fact occupied by and under the control of the United States.

(*c.*) It was and still is the only "foreign" territory occupied by or under the control of the United States.

The Hawaiian Islands had been formally annexed to the United States by the action of the executive and the national legislature.

Joint Resolution of July 7, 1898, 30 Stat., 750.

Porto Rico, the Philippines and the Island of Guam had been ceded to the United States by the Treaty of Paris, and were therefore a part of the national domain.

Cross *v.* Harrison, 16 How., 164.

Ex parte Ortiz, 100 Fed. Rep., 955.

Opinion of Brown, District Judge, in Bigley *v.* N. Y. & Porto Rico S. S. Co. (*supra*).

They were no longer foreign, since by the treaty the United States acquired title to their soil and dominion over them.

Goetz *v.* United States, 103 Fed. Rep., 72.

(*d.*) When the act was passed there was no treaty provision or Act of Congress under which persons charged with crime in Cuba could have been lawfully apprehended in the United States and sur-

rendered for trial in that island. There was therefore no authority for their extradition.

Holmes *v.* Jennison, 14 Peters, 540.
2 Op. Atty.-Gen., 452, 559 (Taney).
6 *Ibid.*, 85 (Cushing).
Dana's note (Dana's Wheaton), No. 73, pp. 182–184.
See also the reports of the House and Senate Committees on the Judiciary, *ante*, pp. 80, 83.

(*e.*) The alleged offenses of the appellant in Cuba, his "indictment" there, and the absence of any provision of law, by treaty, legislation or otherwise, authorizing his extradition, were the "known conditions" out of which the occasion for the adoption of the measure arose.

United States *v.* Trans-Missouri Freight Assn., 166 U. S., 290, 318.
Dunlap *v.* United States, 173 U. S., 65 75.

(*f.*) The legislative history of the act shows that it was passed for the express purpose of enabling the appellant's surrender.

Supra, pp. 77–84.

FIFTH.—If the political status of the Island of Cuba, as established by the recognition of Cuban independence, still continues, the institution and maintenance by the President of a military government in Cuba was and is without authority under international law, and in flagrant contra-

vention of the Constitution of the United States.

It has been judicially decided that the Treaty of Paris worked no change in the political status of Cuba.

> Betancourt *v.* Mutual Reserve Fund Life Ins. Assn. (*supra*), 101 Fed. Rep., 305.

In so holding Judge Lacombe said:

> "It is contended, however, that in some way or other the treaty with Spain, of December 10, 1898, did, from the date of its ratification, remove him from the category of 'foreign citizens or subjects.' By the first article of the treaty Spain relinquishes all claim of sovereignty over and title to Cuba, and as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property. The fourteenth article further states that it is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof. The ninth article provides for Spanish subjects, natives of the Peninsula, who remain in the territory covered by the treaty. If they make a certain declaration within a limited time they may preserve their allegiance to the crown of Spain, and in default of such declaration they are to be held to have renounced such allegiance, and to have adopted 'the nationality of the territory in which they may reside' There is certainly nothing in all this which lends any color to the proposition that the plaintiff is not a foreign citizen."

If, however, the treaty could have been construed as an assertion of American sovereignty in Cuba, the President and the national legislature have since

that time receded from that position by treating the Cubans as a "foreign nation."

See *ante*, pp. 66-67, 114-115.

Nevertheless, shortly after the treaty was signed the President appointed a military governor for the Island, who from the 1st day of January, 1899, to the present time, has governed it by what is, in effect, martial law, or at least what can be best described by that term. During this entire administration perfect peace has prevailed between the United States and Spain. The United States has always been on terms of peace and amity with the Cuban people, and, as is notorious, there has been no disorder there since the evacuation by the Spanish troops.

Congress has not authorized this action on the part of the President. It therefore depends for support entirely upon his power and authority under the Constitution as the Chief Executive of the nation.

I.

(*a.*) While the Government now enforced in Cuba is a "military" form of goverment, it is administering "martial," not "military" law, that is to say, it is the rule of a military dictator who assumes and discharges all governmental functions – executive, legislative and judicial.

Military law is the rule which governs the army alone. It cannot be applied to civilians not in the military service. Martial law is therefore the only rule which can be said to prevail when all the branches of government are administered by the military power.

We use the term in a broad sense for, of course, when there is no war the rules of war do not prevail; therefore, technically speaking, there can be no such thing as martial law in time of peace.

Military law exists in peace and in war. It is as fixed and definite in its provisions as any other branch of law, and is equally, with them, a part of the general law of the land.

But, in the words of Chancellor Kent, "martial law is quite a distinct thing." It exists, or at least can be properly exercised, *only in the time of war*, and originates in *military necessity*. It derives no authority from the civil law (using the term in its more general sense), nor does it require, though it often demands, assistance from the civil tribunals, for it may overrule, suspend or replace both.

It is, from its very nature, an arbitrary power, and extends to all the inhabitants (whether civil or military) of the district where it is in force.

> "It is the application of military government—the government of force—to persons and property within the scope of it, according to the laws and usages of war, to the exclusion of the municipal government, in all respects where the latter would impair the efficiency of military law or military action."
>
> Benet's Military Law and Courts-martial, 14.
>
> "It is one of the *incidents of war;* and, like the power to take human life in battle, *results directly and immediately from the fact that war legally exists.*"
>
> International Law and Laws of War, Halleck, 380.

Major O'Brien, in his Treatise on American Military Laws and the Practice of Courts-martial (p. 26), observes:

> "Many erroneous notions and much unfounded prejudice, in regard to military institutions, have arisen from confounding *military* with *martial* law. The popular opinion seems to be that these are but two names for the same code. Nothing can be further from the truth. Military law is a digested system of enactments, carefully made and deliberately confirmed by the supreme legislative authority of the commonwealth, and published for the observance of a body known to the Constitution, and created and sustained like any

other executive organ of the country. Martial law is something very different from this. As Blackstone very truly remarks, *it is, in fact, no law.* It is an *expedient* resorted to in times of *public danger, similar, in its effects, to the appointment of a dictator.* The General or other authority charged with the defense of a country, proclaims martial law. By so doing, he places himself above all law. *He abrogates or suspends, at his pleasure, the operation of the law of the land.* He resorts to all measures, however repugnant to ordinary law, which he deems best calculated to secure the safety of the State in the imminent peril to which it is exposed. Martial law, being thus vague and uncertain, and measured only by the danger to be guarded against, exists only in the breast of him who proclaims and executes it. It is contained in no written code. It bears, therefore, no analogy whatever to military law, and should ever be carefully distinguished from it. *Despotic in its character, and tyrannical in its application, it is only suited to those moments of extreme peril when the safety and even existence of a nation depend on the prompt adoption and unhesitating execution of measures of the most energetic character.* That such cases do arise, all history attests; and that popular governments are illy calculated to meet them, it would be vain to deny. At such periods, republics especially require some prompt mode of suddenly drawing out, and instantaneously applying, the whole energies of the people. From this principle of *self preservation*, the Constitution of the United States has wisely, and indeed necessarily, permitted the proclamation of martial law in certain specified cases of public danger *when no other alternative is left to preserve the State from foreign invasion or domestic insurrection.*"

See also

Blackstone, Vol. I., ch. 13, p. 413.
Kent's Com. (10th Ed.), Vol. I., p. 377.
De Hart, observations on Military Law, &c., p. 17.
Cowell's Law Dic.

Burrell's Law Dic., Vol. II., p. 708.
Clode, Military & Martial Law. p. 162.

Sir Charles Napier said:

> "The union of legislative, judicial and executive power in one person is the essence of martial law."
>
> *Ibid.*

This Court has said:

> "Martial law is the *law of military necessity* in the *actual presence of war*. It is administered by the general of the army and is in fact his will. Of a necessity it is arbitrary, but it must be obeyed.
>
> U. S. *vs.* Diekelman, 92 U. S., 520.

(*b.*) Since under the common law martial rule is only permissible as a war measure, in time of actual war, and then only in hostile territory, it is clear that there was never any authority for its exercise in Cuba, if our position regarding the status of that island is sound.

> "It is hardly necessary for us to add that, in our view of the case, martial law can never be enforced for the ordinary purposes of civil or even criminal justice, except in the latter, so far as the necessity arising from actual resistance compels its adoption."
>
> From the joint opinion of Sir John Campbell, Attorney-General, and Sir R. M. Rolfe, Solicitor-General (1838) as to the power of the Governor of Lower Canada to proclaim martial law. III. State Trials (new series), Appendix I, p. 1355.

The question in Dow *v.* Johnson, 100 U. S., 632, was, as Mr. Justice Field stated:

> "What is the law which governs an army *invading an enemy's country?*"

And, answering the question, that distinguished Judge continued:

> "It is not the civil law of the *invaded* country, it is not the civil law of the *conquering* country, it is military law, the *law of war*, and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the *enemy's country*, is as essential to the efficiency of the army as the supremacy of the civil law at home and in time of peace is essential to the preservation of liberty."

> "*It never was legal*, however to exercise martial law or the law of war *against the subject in time of peace*, or *against ordinary offenders for ordinary offenses*, and although at certain periods of our history it was found convenient to issue commissions of martial law for the punishment of such offenders and the repression of such mere riots or disturbances as could be repressed by the ordinary means and powers of law, *there never was any doubt that such commissions were wholly illegal.*"
>
> Finlason, Commentaries on Martial Law, p. 87.

(*c.*) It seems clear that the forcible intervention of the United States in the war between Spain and the Cuban people made the United States the friendly ally of the latter in a joint war against Spain.

This was the inevitable result, if, as a matter of fact, the people of the Island of Cuba were, as the President had found they were, free and independdent.

As the President well put it in his message of April 11, 1898:

> "In case of intervention our conduct would be subject to the approval or disapproval of such government. We would be required to submit to its direction, and to assume to it the mere relation of *friendly ally*."

But notwithstanding his former views on the subject, the President deemed it proper to approve the joint resolution, and, acting in accordance with its recommendations, to formally recognize the independence of the Cuban people. We thus became the "friendly ally" of Cuba, then at war with Spain, and thereafter our forces and those of Cuba waged a joint war against the Spaniards until hostilities ceased and the Treaty of Paris was concluded.

This proposition does not admit of serious discussion.

When war exists between the government *de jure* of a country and a government *de facto* of a seceding portion of the same country, other powers are entitled to remain indifferent spectators of the contest, and to allow impartially to both belligerents the free exercise of those rights which war gives to public enemies against each other; or they may espouse the cause of the party which they believe to have justice on its side.

Twiss, Law of Nations (2nd Ed.), Sec. 239.

Lawrence's Wheaton, 40, and notes.

> "In the first case, the foreign nation fulfills all its obligations under the laws of nations, and neither party has a right to complain, provided that it maintains an impartial neutrality; but in the latter case, the foreign state becomes the enemy of the party against whom it declares, and the ally of the other."
>
> Mr. Justice Clifford in Ford *vs.* Surget, 97 U. S., 594, 614, citing Wheaton.

This distinguished jurist said in the same case (97 U. S., p. 610):

> "It (a third party) may assist the government *de jure* as an independent power, or it may assist the insurgents, in either of which it becomes a party to the war; or it may remain impartial, still continuing to treat the govern-

ment *de jure* as an independent power, while it treats the insurgents as a community entitled to the rights of war against its adversary."

(*d.*) If the Island of Cuba was Spanish territory at the time of the American intervention the Cubans were our enemies.

The immediate and necessary consequence of war is to interdict all intercourse between the subjects of the belligerent States, and all persons residing in the hostile territory may be treated as enemies.

Hanger *v.* Abbott, 73 U. S., 535, 536.
The Prize cases, 67 U. S., 635, 674, 693.
Jecker *v.* Montgomery, 18 How., 110.
The Rapid, 8 Cranch, 155.
Brown *v.* Hiatts, 15 Wallace, 177, 184.
United States *v.* Pacific R. R., 120 U. S., 227, 233.
Mrs. Alexander's Cotton, 69 U. S., 404, 419.

That Cuba was not regarded as Spanish territory by the political branch of our government, but as the territory of a friendly foreign power, is made apparent by many circumstances, *e. g.*, the legislation of Congress providing for the furnishing of arms and subsistence supplies to the Cuban army, the action of the President in co-operating with the Cuban troops, &c.

(*e.*) Plainly, no nation can "occupy" or "control" the territory of a friendly power within the proper meaning of those terms.

"Occupation" of territory by a foreign army is its possession by force of military power to the exclusion of the sovereign. "Control" is practically the the same thing.

Foreign armies may be *stationed* in the territory of an ally or other friendly power, or may make it the base of military movements, but this is not occupation or control.

The latter only exists when, by force of arms, the actual possession of territory is wrested by an invader from its owner—in other words, when the territory is conquered.

It follows that the Island of Cuba as a whole was never hostile territory or "enemy ground." Our troops did not invade the island or any portion of it. Such portions of the island as were occupied by the Spanish forces may have been hostile territory until our forces, in conjunction with the Cuban army, forced them to surrender possession. Then, however, even such territory ceased to be hostile. The temporary dominion exercised by the Spanish invaders, having been wrested from them, was replaced by the sovereignty and authority of the Cuban people.

Under these circumstances there never has been any occasion, or any justification in public law, for the institution or maintenance in Cuba, by the President, temporarily or otherwise, of a military government of any kind.

II.

The Constitution of the United States confers no power upon the President to erect a military government in friendly foreign territory at any time, whether in time of war or peace.

It must be conceded that the President, as the Commander-in Chief of the Army and Navy may, by his military commanders, lawfully govern hostile territory, domestic or foreign, which he has invaded or conquered, in time of internal insurrection or of foreign war.

The decisions of this Court are uniform and controlling on this proposition, and it is quite unnecessary to cite them, or to discuss the principles or sound reasoning upon which they are based. These authorities, however, have no possible bearing upon the present case. It is one thing to govern enemy territory in the exercise of a recognized belligerent

right. The law of necessity requires that this should be done, for the preservation of the conqueror and the success of his arms. It is quite another to govern the territory of one's friendly ally, even though that ally be a weaker nation, and the greater power honestly believes that unless it assumes the burden of government the weaker one will be unable to successfully maintain its national character.

The question of the consent of the weaker nation is wholly immaterial to this case. There may be, and doubtless are, civilized nations whose form of government admit of this peculiar character of charity. An absolute monarch could, of course, assume to govern, as many foreign nations as chose to accept him as their ruler, and perhaps many constitutional monarchies could undertake the same responsibility.

(*a.*) With us, however, the question comes down to one of power. Has the President the power to govern the territory of a friendly foreign people in time of absolute peace? If, so, in what manner and by what authority has this tremendous power been conferred upon him?

> "The government of the United States is one of enumerated powers, the constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess."
>
> Cooley, p. 9.

> "The government of the United States can claim no powers which are not granted by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."
>
> Chief Justice Marshall in Martin *v.* Hunter's Lessee, 1 Wheaton, 326.

The President can exercise no authority whatever but that which the constitution and laws give him. Beyond it he has no more power than any other citi-

zen. Our system knows no authority beyond or above the constitution and the laws. We may therefore dismiss the notion that the President has any prerogative as the representative of the people or as interpreter of the popular will. He is elected by the people to perform for them, and on their behalf, those functions, and those only, which are conferred upon him by the constitution and the laws made pursuant to it.

In Europe the executive is almost synonymous with the sovereign power of a state, and may include legislative and judicial authority.

In the United States the case is very different. Our government is founded upon compact. Sovereignty is in the people. It has been entrusted by them, so far as is necessary for the purposes of government, to the federal authorities by the Constitution. That instrument effectually separates the legislative, judicial and executive powers, which under our system are each a branch of the national sovereignty. The well being of the whole depends upon keeping each department within its limits. When either branch of the government usurps that part of the sovereignty which the Constitution assigns to another branch liberty ends and tyranny commences.

The decision in the English courts are not in point.

> "But in the distribution of political power between the great departments of government there is such a wide difference between the power conferred on the President of the United States and the authority and sovereignty which belong to the English crown that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide."
>
> Chief Justice Taney in Fleming *et al.* **v. Page, 9 Howard, 603, 618.**

(*b.*) That the President is exercising judicial and legislative power in Cuba cannot be denied. Through the Military Governor he has promulgated laws. He has established courts, prescribed their jurisdiction and their practice, and administers civil and criminal justice through their instrumentality.

Every trial involves the exercise of judicial power. From what source does the President or his military representatives derive judicial power? Certainly not from the Constitution, because that instrument expressly vests it "in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish," and it will not be pretended that the tribunals through which the Military Governor administers justice in Cuba are courts ordained and established by Congress.

It is clear, therefore, that his administration in Cuba involves the exercise of all the powers of government—executive, legislative and judicial. But by our Constitution these powers are carefully separated. Each is entrusted to a different department, and great care has been taken to prevent a usurpation by any branch of any of the powers bestowed upon the others.

Speaking of the theory of our government in this regard the immortal Washington said:

> "It is important, likewise, that the habits of thinking in a free country should inspire caution, in those entrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in this exercise of political power, by dividing and distributing into different depositories, and constituting each the

guardian of the public weal against invasions by the others, has been evinced by experiments ancient and modern; some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

American Patriotism, p. 191.

(*c.*) The President of the United States possesses no power other than that given him by the Constitution and the laws of Congress; that is, there are no *inherent* powers in the Executive, no *reserved* authority, no implied prerogatives other than those which are necessarily dependent upon and derivable from the expressed constitutional provisions and the laws.

With the evils of a monarchy fresh in their memory the framers of the Constitution surrounded the President with such checks as to make him a mere *executive* officer. His powers were specifically defined and confined to the narrowest compass.

They are enumerated in Article II. of the Constitution, by which he is invested with the "executive power"; he is "commander-in-chief of the army and navy of the United States and of the militia of the several States when called into the active service of the United States"; and he is to "take care that the laws be faithfully executed."

(*d.*) The "executive power" is the executive power of the United States. It is not an unlimited power. It does not correspond to the powers which have

been or may be exercised by the executive of any other government.

Except the high honor of receiving embassies, as the representative of the government, he is stripped of all attributes of sovereignty; he is given no jurisdiction over the legislative or judicial branches, but on the contrary is made amenable to the former for his unofficial, as well as official, conduct; he can create no office, and his appointing power is only conditional; he is unable to declare war, or alone make treaties; his authority is mainly negative, confined chiefly to offering suggestions to Congress, granting pardons and reprieve, to concluding treaties and appointing ambassadors and other public officers "by and with the advice and consent of the Senate."

He cannot, in the absence of a treaty or act of Congress authorizing it, surrender up to justice a person charged with crime in a foreign place.

The injunction that he is to "take care that the laws be faithfully executed" means, that he is to use the methods furnished by law. The laws provide, not only what is to be done, but the manner of doing it, and this the President must observe.

> "It is perfectly plain and manifest that, although the framers of the Constitution meant to confer executive power on the President, yet they meant to define and limit that power, and to confer no more than they did thus define and limit. When the say it shall be vested in a President they mean that one magistrate, to be called a President, shall hold the executive authority; but they mean, further, that he shall hold this authority according to the grants and limitations of the Constitution itself."
>
> 4 Webster's Works, p. 186.

Manifestly there is nothing in the clause under consideration justifying the government now in Cuba.

(*e.*) There remains but a single clause to consider, and that is the one which makes him the commander-in-chief of the army and navy of the United States and the militia of the States when called into the federal service.

It seems almost absurd to suppose that the authority of the President as commander-in-chief carries with it the right to govern by martial law the territory of a foreign power with whom the United States are on terms of peace and amity, when, in the absence of a statute authorizing it, he was concededly without power to comply with the requisition of his own military subordinate, for the surrender of the appellant.

From the constitutional provision in question is adduced what is commonly called the "war power" of the President. But that power is in fact nothing more than the authority to command the armies and fleets which Congress causes to be raised. To command them is simply to direct their operations.

Federalist, No. 69.
Brown *v.* U. S., 8 Cranch, 126–145.
Dynes *v.* Hoover, 20 How., 81.
Wilson *v.* McKenzie. 7 Hill, 97.

It is for Congress to decide, in the first place, whether there shall be an army or navy, and the President must command the army or navy as it is created by Congress, and subject, as is every other officer of the army or navy, to such rules and regulations as Congress may from time to time establish.

It is for Congress to declare war, and until war is declared the President can exercise none of the powers of war.

There is no war in Cuba. The war was ended by the Treaty of Paris.

In time of peace the legislative and judicial branches of the Government are supreme in their respective spheres.

> "The President is the commander-in-chief of the army and navy, not only by force of the Constitution, but under and subject to the Constitution, and to every restriction therein contained, and to every law enacted by its authority, as completely and clearly as the private in the ranks. He is general-in-chief, but can a general in chief disobey any law of his own country? When he can he superadds to his rights as commander the powers of a usurper, and that is military despotism. * * * The mere authority to command an army is not an authority to disobey the laws of the country."
>
> "Executive Power," by Benjamin R. Curtis, Cambridge, Mass., 1862.*

The various provisions of Article I. of the Constitution conferring powers upon Congress show that the powers of the President do not include the power to raise or support an army, nor to provide or maintain a navy, nor to call both the militia to repel an invasion, nor to suppress an insurrection, nor to make laws for any place within the national jurisdiction.

If the President could not, even in flagrant war, except as authorized by Congress, call forth the militia of a State to repel an invasion of that State, it is absurd to say that he could in time of peace govern a foreign country by his military forces.

(*f.*) The establishment of a military government by the United States in Cuba after the war was ended and absolute peace prevailed cannot be defended as a war measure.

The war power has no existence except in time of war. The rights of war are against enemies; open

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* This work contains the following dedication by its distinguished author: "To all persons who have sworn to support the Constitution of the United states and to all citizens who value the principles of civil liberty which that Constitution embodies, and for the preservation of which it is our only security, these pages are respectfully dedicated by THE AUTHOR."

and armed enemies, while enemies and during war, but no longer.

Dissenting opinion of Mr. Justice Woodbury in Luther *v.* Borden, 7 Howard, 85, citing Vattel, B. 3, Ch. 8, Sec. 149.

"For if one has previously been in arms, but the insurrection or war is over, any belligerent rights cease, and no more justify a departure from the municipal laws than they do before insurrection or war begins. If any are non-combatants, either as never having been engaged in active resistance, or as having abandoned it, the rights of civil warfare over them would seem to have terminated, and the prosecution and punishment of their past misconduct belongs, then, to the municipal tribunals, and not to the sword and bayonet of the military."

Ibid, 86.

"With the cessation of hostilities the jurisdiction of the military tribunals to try and punish offenders belonging to or attached to the military establishment ceased. The military code of the United States seems to have been constructed without any consideration of the needs of an army in occupation of foreign territory in time of peace."

Special Report of Brig. Gen. Leonard Wood on Insular Affairs, as per instructions of Circular No. 10, War Department, March 25, 1899. 56th Congress, 1st Session, Doc. No. 2.

Even in time of war the Commander-in-Chief can employ only such measures as are necessary for the preservation of the army, or the safety of the nation. He has no right to use the national forces for any other purpose whatever.

The war power is limited to times of war, and the absolute necessities of military operations.

As this Court said in speaking of the appoint-

ment of a provisional governor for Texas, during the reconstruction period and "while the war yet smouldered" in that State:

> "Whether the action then taken was, in all respects, warranted by the Constitution, *it is not now necessary to determine*. The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions as Commander-in-Chief; and, *so long as the war continued*, it cannot be denied that he might institute temporary government within *insurgent districts occupied by the national forces*, or take measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts only *such means and agents as were authorized by constitutional laws*."
>
> Chief Justice Chase in Texas *v.* White, 7 Wallace, 700, 729–730.

> "*In time of war* the President is not above the Constitution, but derives his power expressly under provision of that instrument, declaring that he shall be Commander-in-Chief of the Army. The Constitution does not specify the powers he may rightfully exercise in this character, nor are they defined by legislation. No one denies, however, that the President in this character is invested with very high powers, which it is well known have been called into exercise on various occasions during the present rebellion. * * * It is, perhaps, not easy to define what acts are properly within this designation, but they *must undoubtedly be limited to such as are necessary to the protection and preservation of the Government and the Constitution which the President has sworn to support and defend*" *Opinion* of Judge Leavitt in *ex parte* Vallandigham, Trial of Hon. Clement L. Vallandigham, published by Rickey & Carroll, 1863, p. 266.

(*g.*) The position of the Government makes the President the impersonation of the country, and claims for him the power and right to use all the

force he can command—not "to save the life of the nation," but to establish a government for another and independent people.

It has been suggested that if the President had not assumed this burden, that is, if upon the cessation of hostilities he had withdrawn our troops from Cuba, a state of anarchy would have prevailed in that island.

There are several answers to this suggestion. In the first place it was not for the President, as commander-in-chief, to dispute the truth of the political finding that the Cubans had an established government.

Again, there is no possible necessity justifying executive action except for the protection of American interests. This nation has no concern in the safety or welfare of another power except so far as its own interests are involved. The rules applicable to such cases will be considered hereafter.

In any event the doctrine sought to be advanced comes to a plea of "necessity." Our Constitution admits of no such plea

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity upon which it is based is false; for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."
>
> Davis, *J.*, in *Ex parte* Milligan, 71 U. S., 120–121.

As long as war lasted, it was undoubtedly competent for the President, in the conduct thereof, to

institute such war measures, in conjunction with our Cuban allies, as were dictated by the existing necessity; but when the necessity ceased so also did the power. Just as soon as the allied forces of the United States and Cuba succeeded in expelling the Spanish troops from the territory of the Cubans, and in thus vindicating the acknowledged independence of the latter, nothing remained but for this country to leave them to its enjoyment. The relations between the United States and Cuba remained, as they have been throughout, entirely friendly. There was no war or pretense of war, and hence no possible justification for the employment of the war power.

III.

(*h.*) In the well known case of *Ex parte* Milligan, 71 U. S., 2, it was held that in a State where the federal authority was unopposed no usage could sanction a military trial for any offense whatever of a citizen in civil life, in no wise connected with the military service, notwithstanding a state of war existed between the federal government and the rebel states, and that military departments were established in the loyal States. Davis *J.*, delivering the prevailing opinion, said:

> "*Congress could grant no such power*, and
> "to the honor of our national legislature, it
> "has never been provoked by the state of the
> "country even to attempt its exercise."

Four judges dissented, believing that the privilege of the right of *habeas corpus* being necessarily suspended, trial and punishment by military commissions might have been authorized by Congress had it chosen to do so, even where the civil courts remained open. While the dissent is quite unimportant here (for we have nothing except a state of absolute and undisturbed peace), the opinion of the minority of the Court strongly confirm the soundness

of our position in the present case. We shall quote some of its language:

> " But we do not put our opinion, that Congress might authorize such a military commission as was held in Indiana, upon the power to provide for the government of the national forces.
>
> Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to *all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief.* Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.
>
> The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offenses, either of soldiers or civilians, unless in case of a controlling necessity, which justifies what it compels, or at least, insures acts of indemnity from the justice of the Legislature.
>
> *We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.*
>
> *Where peace exists the laws of peace must prevail.* What we do maintain is, that *when the nation is involved in war* and some portions of the country are invaded and all are

exposed to invasion it is within the power of Congress to determine to what States or districts such great and imminent public danger exists as justifies the authorization of military tribunals for *the trial of crimes and offenses against the discipline or security of the army against the public safety.*

In Indiana, for example, at the time of the arrest of Milligan and his co conspirators, it is established by the papers in the record that the State was a military district, was the theatre of military operations, had been actually invaded and was constantly threatened with invasion. It appears, also, that a powerful secret association, composed of citizens and others, existed within the State, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the State and National arsenals, armed co-operation with the enemy and war against the National Government.

We cannot doubt that, in such a *time of public danger*, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. * * *

It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them. With that prohibition we are satisfied, and should have remained silent if the answer to the question certified had been put on that ground, without denial of the existence of a power which we believe to be constitutional and important to the public safety —a denial which, as we have already suggested, seems to draw in question the power of Congress to protect from prosecution the members of military commissions who acted in obedience to their superior officers, and whose action, whether warranted by law or not, was approved by that upright and patriotic President under whose administration the Republic was rescued from threatened destruction.

We have thus far said little of martial law, nor do we propose to say much. What we have already said sufficiently indicates our opinion that *there is no law for the government of the citizens, the Armies or the Navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution. And wherever our Army or Navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress.*

There are under the Constitution *three kinds of military jurisdiction:* One to be exercised both in peace and war; *another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within States or districts occupied by rebels treated as belligerents*; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under military law, and is found in Acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; *the second may be distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander, under the direction of the President, with the express or implied sanction of Congress*; while the third may be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

We think that the power of Congress, *in such times and in such localities*, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces."

IV.

The executive department has invented and bestowed upon the military system in Cuba novel appellations. It calls it a "holding in trust for the inhabitants" (President's Message, Dec. 5, 1899); "the control now held by us in trust for the people of Cuba" (Report of Secretary of War for 1899, Vol. I., p. 16), &c.

Where is the authority for the "holding in trust" by the President of territory which does not belong to the United States?

The powers of government are indeed a trust, but they can only be lawfully exercised for the good of the American people—not for the benefit of the inhabitants of any foreign place.

It is true that when the President acquires foreign territory, he holds it in trust. But the people of the United States are the beneficiaries of the trust, and he holds or relinquishes possession as they shall determine.

At the last term of this Court, Mr. Justice Shiras, delivering the opinion in Morris *v.* The United States (174 U. S., 196, 237), and quoting from Shively *v.* Bowlby (152 U. S., 57), said, referring to the cession by the State of Maryland of the Federal territory in the District of Columbia:

> "Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by a treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States for the *benefit of the whole people* and in trust *for the several States to be ultimately created out of the territory.*"

V.

If we are correct in our position, the President has been guilty of a plain violation of the laws of the United States in making such a use of the army of the United States in the island of Cuba, as the

facts show he has, without the authority of Congress.

Upon the conclusion of the treaty of peace the President ceased to have power to use the army in Cuba for any purpose; and it cannot be pretended that the President in his executive capacity as chief magistrate can consistently with the Constitution and laws of the United States employ the army for any purpose not plainly authorized thereby.

By Section 15 of Chapter 263 of an Act of Congress passed June 18, 1878, it is provided as follows:

> "From and after the passage of this act it shall not be lawful to employ any part of the army of the United States, as a *posse comitatus* or otherwise, for the purpose of executing the laws, except in such cases, and under such circumstances, as such employment of said force may be expressly authorized by the Constitution or by act of Congress."

VI.

The Treaty of Paris furnishes no justification for the military occupation of Cuba by the United States. Our Government could not derive from the treaty any right or power not conferred by the Constitution. As long ago as the case of Pollard's Lessees *vs.* Hagan, it was there held that under the Florida treaty the United States did not succeed to those rights which the King of Spain had held by virtue of his royal prerogative, but possessed the territory subject to the provisions of the United States Constitution. The Court said:

> "It cannot be admitted that the King of Spain could by treaty or otherwise impart to the United States any of his royal prerogatives, and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory by treaty or otherwise must hold it subject to the constitution and laws of its own

> government and not according to those of the government ceding it."
>
> 3 How., 212, 225.

In the License Cases, it was said:

> "Laws of the United States in order to be binding must be within the legitimate powers vested by the Constitution. Treaties to be valid must be within the scope of the same powers, for there can be no 'authority of the United States,' save what is derived mediately or immediately and regularly and legitimately from the Constitution."
>
> 5 How., 504, 613.

Again:

> "The Government of the United States * * * is one of limited powers. It can exercise authority over no subject except those which have been delegated to it. Congress cannot by legislation enlarge the federal jurisdiction, nor can it be enlarged by the treaty-making power" McLean, *J.*, in the Mayor, &c., of New Orleans *vs.* United States, 10 Peters, 662, 736.

Furthermore, aside from the limitations imposed by our Constitution, the result would necessarily be the same. Spain could not part with any rights in Cuba, because she had none. Her sovereignty there had already been completely wiped out.

VII.

There are occasions when it is permisible for one nation to invade the territory of another, *e. g.*, when the lives and property of its citizens are endangered, or perhaps, when such course is imperative from motives of self-protection.

But no such condition justifies the erection of a military governor in such invaded territory whereby

the affairs of its inhabitants are to be administered by the commander of the invading forces.

Nor have the principle of international laws which permits such invasion any application to the present situation of affairs in Cuba.

Our army never entered Cuba with any hostile intent, or to repel any assault upon our sovereignty. They were not sent there to protect American interests, or to serve any purpose except to aid our Cuban allies in the expulsion of the Spanish forces—the common enemy.

SIXTH.--Entirely apart from the question of the status of Cuba, the act of June 6, 1900, is unconstitutional and void because it seeks to deprive the appellant of the rights, privileges and immunities guaranteed to all persons accused of crime in every place within the sovereign power and dominion of the United States.

Our Constitution contains many provisions which in their very nature, or by their very terms, circumscribe and limit the executive, legislative and judicial departments in the exercise of their respective powers at all times and in all places.

Such are the provisions as to the suspension of the writ of *habeas corpus*, as to bills of attainder and *ex post facto* law, and others in Art. I., § 9, the provision for trial by jury in § 3 of Art. II., the Bill of Rights embodied in the first ten amendments and the thirteenth, in part the fourteenth and the fifteenth amendments.

We quote the fundamental rights, privileges and immunities which the Constitution guarantees to

persons accused of crime within the national jurisdiction:

> "The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crime shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."
>
> Const., Art. III., § 2, subd. 3.

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land and naval forces," &c.; nor shall any person "be deprived of life, liberty or property without due process of law."
>
> VIth Amendment.

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."
>
> VIIth Amendment.

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."
>
> VIIIth Amendment.

I.

Surely there can be no question of the restrictive effect of these prohibitions and limitations upon all the branches of the government.

Neither the executive, legislative or judicial departments can, under the Constitution, exercise power over the person or property of any one beyond

what the Constitution confers, nor lawfully deny any one of any right which it has guaranteed.

Our institutions of government

> "do not mean to leave room for the play and action of purely personal and arbitrary power."
>
> Matthews, *J.*, in Yick Wo *v.* Hopkins, 118 U. S., 370.

Its theory

> "is opposed to the deposit of unlimited power anywhere."
>
> Miller, *J.*, in Loan Assn. *v.* Topeka, 20 Wall., 663.

It follows that the President is forbidden to exercise the executive function precisely as Congress may not legislate, or the courts expound the law, in such a manner as to violate any of the constitutional provisions.

The Constitution provides that—

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," &c.
>
> Article IV., § 3, Sub. 2.

This power is not, however, an arbitrary or unrestricted one, but it is subject to all the limitations of the Constitution respecting *habeas corpus*, trial by jury and the like.

> Reynolds *v.* United States, 98 U. S., 145.
> Callan *v.* Wilson, 127 U. S., 540.
> Springville *v.* Thomas, 166 U. S., 707.
> Baumann *v.* Ross, 167 U. S., 548.
> Thompson *v.* Utah, 170 U. S., 343.
> Capital Traction Co. *v.* Hof, 174 U. S., 1.
> Block *v.* Jackson, 177 U. S., 363.

In Callan *v.* Wilson, 127 U. S., 540 (1887), the appellant had been tried and convicted of conspiracy in

the Police Court of the District of Columbia, without a jury pursuant to the act of Congress (Rev. Stat., Dist. Col., § 1046). In reversing the conviction upon the ground that the statute was unconstitutional and void, the Court said, per Harlan, *J.*:

> "As the guarantee of a trial by jury in the Third Article, implied a trial in that mode and according to the settled rules of the common law, the enumeration in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and *so far as the agencies of general government were concerned*, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty and property."

In Springville *v.* Thomas, 166 U. S., 707 (1896), the Supreme Court of the Territory of Utah, had, in upholding an act of the territorial Legislature providing that a verdict in a civil case should be valid, if concurred in by nine jurors, construed the Act of Congress establishing the Territory as having

> "vested in the territorial Legislature such unlimited legislative power as enabled it to provide that unanimity * * * was not necessary to a valid verdict."

The question before this Court was whether the Act of Congress, as thus construed, was constitutional. In holding that it was not, Chief Justice Fuller, delivering the unanimous opinion of the Court, said:

> "In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases; and the Act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so."

II.

When the President assumed the right to govern the Island of Cuba, all the laws then in force in that Island in any manner repugnant to our Constitution were, by the settled principles of international law, immediately displaced.

> "As a matter of course all laws, ordinances and regulations in conflict with the political character, institutions and Constitution of the new government are at once displaced."
>
> Field, *J.*, in Chicago, &c., Ry. Co. *v.* McGlinn, 114 U. S., 542–546.

> "And in case the government of the new state is a constitutional government, of limited and divided power, questions necessarily arise respecting the authority, which in the absence of legislative action, can be exercised in the conquered territory after the cessation of war, and the conclusion of a treaty of peace. The determination of these questions depends upon the institutions and laws of the new sovereign, which, though conformable to the general rule of the law of nations, affect the construction and application of that rule to particular cases."
>
> Halleck, Int. L., Ch. XXXIII., § 14.

As Mr. Marcy said of the military government, in California, in 1848:

> "But the government *de facto* can, of course, exercise no powers inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the land for all the states and territories of our Union."
>
> Cross *v.* Harrison, 16 How., 164.

III.

But the President, in the administration of Cuban affairs, has not only failed to treat the Spanish sys-

tem as displaced, but applies its methods in judicial proceedings.

He has assumed to deny the right of indictment by a grand jury. He has undertaken to try offenders without a jury. He will not allow the remedy of *habeas corpus*. Upon the trial of accused persons he permits the judges to act upon the presumption of guilt instead of that of innocence. He suffers convictions to be had where the accused has never been confronted with the witnesses against him.

We need not further specify the way in which the Cuban judicial system violates our Constitution.

IV.

Our history furnishes no precedent for the methods the President is pursuing in Cuba.

(*a*.) Louisiana, although ceded by France, brought with it the Spanish law, in force since 1769. The successive acquisition of Florida, California and New Mexico found us in possession of territory in which also existed the Spanish system than which there is none more repugnant to the principles of our law.

In none of these instances was the Spanish system permitted to prevail for a moment after we assumed sovereignty and dominion.

Louisiana was ceded by a treaty bearing date April 30, 1803, but the possession of it by the United States depended upon the terms of final ratification by the parties to it, and upon the delivery of it, first from Spain to France and then from France to the United States.

The surrender from Spain to France was formally made on November 30, 1803, and that to the United States twenty days later.

Immediately upon this the constitution and laws of the United States were regarded as in force, and from that time until the organization by Congress of a territorial form of government the following year, the provisional governor in the administration of

the judicial system of the ceded territory observed and enforced all the rights, privileges and immunities guaranteed by our constitution.

For a considerable period after it had passed under the dominion of the United States, while a judicial system strangely combining English case law, French code law and Spanish usages, were enforced, the constitutional safeguards were always observed and enforced.

The Act of Congress (March 19, 1804), creating a territorial government for this territory, declared that the inhabitants should be entitled to the ordinary rights guaranteed by our Constitution, *e. g.*, the writ of *habeas corpus*, trial by jury, bail except in certain capital cases, and immunity from cruel and unusual punishments. With these modifications it left the Spanish criminal law to be deal with by the territorial government, which wholly abolished it, while retaining the civil code, and substituted for it an act defining crimes and misdemeanors, providing for the right of inspecting indictments, examining jurors, consulting with counsel, public trial and sentence, &c. It concluded as follows:

> "All the crimes, offenses and misdemeanors hereinbefore named shall be taken, intended and construed according to and in conformity with the common law of England, and that the forms of indictment (divested of unnecessary prolixity), the method of trial, the rules of evidence, and the prosecution of said crimes, offenses and misdemeanors, charging what ought to be charged, shall be, except as is by this act otherwise provided for, according to said common law."
>
> Acts Leg. Council, Orleans Terr., 1st Sess., Ch. L., Sec. 33.

(*b.*) The Act of Congress for the administration of Florida (March 30, 1822) followed the Louisiana precedent. The Legislative council by a single enact-

ment abolished all Spanish law in force and replaced it by the common law of England.

Leg. Council of Florida, 1st Sess., Act. of Sept. 2, 1822.

A further act defined crimes, and provided for their punishment according to the principles of our system.

Ibid.

(c.) When we were at war with Mexico, and in military occupation of its territory, Brig.-Gen. S. W. Kearny, commanding at Santa Fé, New Mexico, put in force by military order (Sept. 22, 1846) a code of law still known by his name, that superseded the existing criminal code.

"The Kearny Code," printed in Compiled Laws, New Mex., 1897.

Simultaneously with the order establishing the Code, Gen. Kearney promulgated a "Bill of Rights" as follows:

> "That the great and essential principles of liberty and free government may be recognized and established, it is hereby declared:
>
> FIRST.—That all political power is vested in and belongs to the people.
>
> * * * * * *
>
> FIFTH.—The right of trial by jury shall remain inviolate.
>
> SIXTH.—In all criminal cases the accused bas the right to be heard by himself and counsel, to demand the nature and cause of the accusations, to have compulsory process for witnesses in his favor, to meet the witnesses against him face to face, and to have a speedy trial by jury of his county.
>
> SEVENTH.—The accused cannot be compelled to give evidence against himself, or be deprived of liberty or property, but by a verdict of a jury and the laws of the land."
>
> *Ibid.*

The Kearny Code carefully preserved the right of indictment and jury trial, *habeas corpus*, &c.

Six articles were devoted to "*Habeas Corpus*," eleven to "Jurors."

The article entitled "Practice of Law in Criminal Cases" (§§ 10-13) provided for indictment by Grand Juries and a jury system under our Constitution.

Section I. of the article entitled "Laws" was as follows:

> "All laws heretofore in force in this Territory *which are not repugnant to or inconsistent with the Constitution of the United States* and the laws thereof, or the statute laws in force for the time being, shall be the rule of action and decision in this territory."

> "These laws," said General Kearny in a letter to the Adjutant-General, "are taken part from the laws of Mexico—retained as in the original—a part, *with such modifications as our laws and Constitution made necessary;* a part are from the laws of Missouri territory, a part from the laws of Texas, and also of Texas and Coahuila, a part from the statutes of Missouri, and the remainder from the Livingston Code."
>
> *Ibid.*

President Polk, speaking of the Kearny Code, said:

> "It will be apparent from the reports of the officers who have been required by the success which has crowned their arms to exercise the powers of temporary government over the conquered territories, that if any excess of power has been exercised, the departure has been the offspring of a patriotic desire to give to the inhabitants the privileges and immunities so cherished by the people of our own country, and which they believed calculated to improve their condition and promote their property."
>
> President Polk's message of December 22, 1846.

The organic act establishing the territory of New Mexico was approved September 30, 1850. Meantime the Kearny Code was enforced by the *de facto* government.

V.

In *ex parte* Milligan (*supra*), 71 U. S., 2, this court decided that neither the President, nor Congress, nor the judiciary could disturb any one of the safeguards of civil liberty incorporated into the Constitution, except so far as the right is given to suspend the privilege of *habeas corpus* in certain cases. It was further decided in that case, as we have seen, that in time of war a civilian citizen cannot, in a place which is not the actual theatre of war (even though the privilege of the writ of *habeas corpus* has been suspended at that place), be tried by a military tribunal.

At the time Milligan, who was a citizen of Indiana, was tried and convicted "an armed rebellion against the national authority, of greater proportions than history affords an example of, was raging."

71 U. S., 115.

Although Indiana was a loyal State it was at that time comprised in one of the military departments established by the President.

It bordered, however, upon the territory occupied by the insurgents, and was itself at times greatly disturbed by the neighboring hostilities. Milligan was arrested at his home by the military power of the United States on a charge of treason, imprisoned, tried, convicted and sentenced to be hanged, by a military commission organized under the direction of the military commander of the military district of Indiana.

The question before this Court was:

> "Had this tribunal the legal power and authority to try and punish this man?"
>
> *Ibid.*, p. 118.

"No graver question was ever considered by this Court," said Mr. Justice Davis, who delivered the opinion, "for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law."

Ibid., p. 119.

In holding that the military commission was without jurisdiction to try Milligan, and that his detention under its authority was utterly illegal and void, Mr. Justice Davis said:

"If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. *The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning.* Those applicable to this case are found in that clause of the original Constitution which says, 'That the trial of all crimes, except in case of impeachment, shall be by jury'; and in the fourth, fifth and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure; and directs that a judicial warrant shall not issue 'without proof of probable cause, supported by oath or affirmation.' The fifth declares 'that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia,

when in actual service in time of war or public danger; nor be deprived of life, liberty or property without due process of law.' And the sixth guarantees the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries and an able bar, the innocent will be saved and the guilty punished. It is in these words: 'In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.' These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and but for the belief that it would be so amended as to embrace them it would never have been ratified.

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future."

71 U. S., 119–120.

And further:

"It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occu-

> pied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew--the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell, and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this and other equally weighty reasons, they secured the inheritance they had fought to maintain by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. *Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus.*"

The decision of this Court in the Milligan case is in accord with the well-settled law.

In the period of reconstruction, as it is called, which followed the civil war of 1861-'65, a condition existed, or was assumed to exist, which caused Congress to provide for vacating the gubernatorial offices in several of the Southern States and filling them by appointments of the President.

In these States strong military bodies were stationed and general officers of the Army took command. But they enforced *the laws found on their statute books* and also *the laws of the United States.* All the civil officers in those sovereign States were required to obey the commands of those Army officers. The military force was employed actively in the enforcement of the civil laws, and placed in full supremacy over the civil authority.

It was in speaking of the appointment of one of these provisional governors that Chief Justice Chase said that the President might, as Commander-in-Chief, take measures to institute temporary gov-

ernments in insurgent districts occupied by the national forces, or take measures in any state for the restoration of the national authority,

> "employing, however, *only such means and agents as were authorized by constitutional laws.*"

If in the exercise in the United States of his power as Commander-in-Chief the President is by the Constitution limited in time of civil war, and thereafter until the authority of the government is re-established to measures within the constitution, it is plain that he can have no greater power under the Constitution in places, foreign or domestic, where absolute peace prevails.

VI.

It may be that the case of *In re* Ross, 140 U. S., 462, will be supposed to lend color to the theories of the government.

It was there held that a trial in our Consular Court in Japan for a murder committed by an American citizen in Japanese territory need not be by a jury. But the case was decided upon the ground that the crime was an offense against Japan and was committed without the territory of the United States. This court held that our government was established for the United States and not for countries where our constitution has no operation. The authority exercised by our Consul was derived not from the constitution and laws of the United States, but from the government of Japan, being a delegation to him of its sovereignty, ratified and accepted by the treaty between the United States and Japan.

The validity of the treaty stipulation was admitted as flowing from the antiquity and universality of the principles which has from time immemorial recognized the necessity of clothing our consuls with judicial authority in barbaric or semi-civilized coun-

tries, where it would be impossible to obtain a competent grand or petit jury.

To have held that a trial by jury was essential in such cases would have defeated the main purpose of investing the consul with judicial authority (p. 465), and "would, in a majority of cases, cause an abandonment of all prosecution" (p. 464).

These conditions were, of course, known to the framers of our Constitution, and provisions such as those incorporated in our treaty with Japan (and with other nations) were plainly within the treaty making power.

But in the performance of the functions thus conferred upon them, our consuls do not exercise the judicial power of the United States, but of authority delegated to them by the foreign nation, which our treaty making power has permitted them to accept.

As Mr. Justice Field said in the Ross case:

> "The Constitution can have no operation in another country. When, therefore, the representatives or officers of our Government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other."

It may be argued that to permit jury trials in Cuba, in the existing conditions in that island, would be obviously repugnant to the spirit of the Constitution, since the President having determined that the inhabitants of Cuba are as yet incapable of self-government, the courts must deem them unfit to serve as jurors in cases involving the lives and liberties of our citizens. This argument might, perhaps, be resorted to in semi-barbarous localities where the United States had been forced to set up a temporary military government in order to protect American interests. In such a case the spirit of the Constitution would prevail over its letter.

Whitney *vs* Robertson, 165 U. S., 274.

But—

> "the case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception."
>
> Chief Justice Marshall, in Dartmouth College *v.* Woodward, 4 Wheat., 644.

In view of the incidents attending our intervention in the war between Spain and Cuba, and of the facts as we have shown them to exist, we do not believe that this Court will say that an observation in Cuba of the rights, privileges and immunities guaranteed by our Constitution to persons accused of crime, would be "obviously absurd, mischievous or repugnant to the general spirit of the instrument."

But in any event the principles underlying the Ross decision have no possible application to the case at bar. While the Government may contend that the Military Governor of Cuba is exercising an authority which it must be assumed has been delegated to him by the Cuban people, neither the treaty making power, nor any act of the national legislature or other competent governmental authority in the United States has empowered him to accept such authority.

Upon what ground then can the President justify the system which he has established in Cuba? What principle of law, under our Constitution, is it which permits him to deny to persons accused of crime in Cuba the rights conferred by the Constitution upon all such persons in every place where any of the powers which it confers upon the executive can be exercised under its authority?

We submit with great confidence that no situation can justify so radical a departure from the spirit and principles of our Constitution.

SEVENTH. — The doctrine under which the courts will sometimes refuse to inquire into the legality or method of organization of certain kinds of *de facto* governments, or governments "by paramount force," has no application to the case at bar.

The appellant is detained against his will under color of an Act of Congress, the enforcement of which will, if our position is sound, result in his transportation to a foreign country, where the President is now, in defiance of the Constitution, maintaining a military dictatorship.

If surrendered, the appellant will be prosecuted without indictment by a grand jury. He will be tried without a jury, and without any of the safeguards guaranteed by our Constitution.

The appellant contends that these provisions of the Constitution are operative in every place where the Executive asserts his power, since the power itself has no power except the Constitution itself.

This view did not commend itself to the learned Judge below. After showing that the decision of this Court in the Milligan case was "not at all in point," he said:

> "But there is no suggestion here that if remanded to Cuba, Neely will be tried by a court martial, or otherwise than by a civil court, following *the same procedure as that prevailing before the concession of Cuba's independence*. And indeed, *if the criminal laws of the island be enforced solely by courts-martial, that circumstance would not be a sufficient answer to request for extradition;* having chosen the country in which to commit the crime, *he must accept the tribunals which administer its laws.*"
>
> Judge Lacombe's Opinion, p. 5.

The inference from this language is that to the learned Judge's mind the question of the legality of

the tribunals which the President has established in Cuba, or the constitutionality of the procedure therein followed was of no consequence whatever. It being conceded that there is a government *de facto* in Cuba of some kind, the appellant can be constitutionally required to submit to its methods, regardless of what those methods are, and regardless of the fact that that government is being maintained by the President of the United States.

We submit that the learned Judge has fallen into error.

The doctrine of *de facto* governments, or "governments by paramount force" goes no further than to overlook or disregard the means whereby a government existing in fact had its origin.

It has, of course, no application to cases where the fact of the existence of, or of the legality of the acts of a *de facto* government maintained *by the United States itself*, or its representatives, civil or military, is directly and properly brought into question

It may be conceded, and we do readily concede, that the military establishment originally set up by the President in Cuba before the Treaty of Paris was concluded was the *de facto* government of that island, and the only power exercising governmental powers there, and that it has ever since continued to be such.

This, however, does not carry with it the further and entirely different concession that the acts and proceedings of the United States officials who conduct that government, or any of them, have been legal, or to any extent warranted by the Constitution of the United States.

The appellant's position is similar to that of the petitioner in the Milliken case. He is seeking to avoid a trial under a system which violates the Constitution, just as Milliken successfully invoked the jurisdiction of this Court to set aside and annul a trial held in violation of that instrument.

EIGHTH.—The act is also unconstitutional because it is based upon a condition which must be quite ineffectual.

The act provides that "the authorities in control "of such foreign country or territory *shall secure* "*to such person a fair and impartial trial.*" The intention of this clause was plainly to guarantee to every person extradited a fair and impartial trial. It is an integral part of the act, and it cannot be said that the act would have been passed without its presence. Congress assumes to authorize the extradition of persons from this country to Cuba only under the sanction of this guarantee that they shall have justice done them. If, in fact, it is quite impossible for this country to redeem a promise so made, it seems obvious that the whole act must fall.

Plainly it would not be possible for this government to see to it that extradited persons are fairly tried in Cuba. As well might they guarantee that a person extradited to England, or any other independent country, should receive a fair trial, for, as we have seen, our military authorities are beyond the control of the legislative and judicial branches of our government, and neither can dictate to the Military Governor of Cuba the manner in which he shall conduct judicial proceedings or what form of procedure he shall employ in any given case.

NINTH.—The unconstitutionality of the present government in Cuba being established, the extradition act must fall with it.

The act enables the President to seize the person of an American citizen in this country through the requisition of his Military Governor, make a *prima*

facie case against him through the same instrumentality, order his return to Cuba through his Secretary of State, and try him in Cuba, without indictment or jury, in a court constituted by his Military Governor, which is himself, and composed of judges whose official lives are dependent upon his pleasure.

The illegality of the system being established to subject any one to its power would be to deprive him of the rights, privileges and immunities guaranteed by the Constitution.

TENTH.—If the political branch of the Government has not determined the status of the Island of Cuba as that of a free and independent people, or has by the Treaty of Paris, or otherwise, asserted the sovereignty and dominion of the United States in that Island, then Cuba is not a "foreign territory" within the meaning of the Act of June 6, 1900.

If the approval of the joint resolution and the further executive action taken by the President pursuant to it, did not constitute a recognition of Cuban independence, or in any manner affect the status of that Island, then this court must assume that it continued to be Spanish territory throughout the war, or until some act of the Executive or of the political branch of our Government wrought a change in that regard.

It may be argued that the joint resolution was merely in the matter of an expression of the hope of future independence for the Cubans, and a means of clothing the President with authority to forcibly aid in the accomplishment of that end, and that the President's approval of the measure really amounted

to nothing more than to evidence his concurrence in the legislative sentiment and the policy of humantarian interference which it proclaimed and authorized him to pursue.

It may also be argued that even though the incidents following the passage of the joint resolution constituted an actual recognition of Cuban independence by the President at that time, the succeeding events culminating in the conclusion and ratification of the Treaty of Paris effected a complete reversal and nullification by the political branch of the Government's former determination.

If either of these views is sound, then, plainly, the Island of Cuba cannot be regarded as "foreign territory" within the meaning of the Act of June 6, 1900, and the appellant should be discharged from custody for that reason.

But this court, in view of the history of the events which brought about the recent war, of the avowed unselfish policy and purely benevolent motives which inspired our intervention and the joint action with our Cuban allies which resulted, and of our repeated disavowal of any intention to profit by the defeat of Spain, will not be slow to accept either of these theories.

To do so would be to determine that the result of the war was to vest in the United States sovereignty and dominion over and title to the Island of Cuba.

(*a*.) If Cuba is not a free and independent power, but continued to be a Spanish colony until the termination of the war, then it may be that our executive was justified in treating it as enemy's territory.

In that case there is no escape from the conclusion that it must be regarded as property or territory belonging to the United States.

The military arm of our government deals with our enemies' territory as property. Such territory is lawful prize of war.

If our military occupation of Cuba was that of a

conqueror of enemy territory it must follow that Spain's relinquishment of all claims of sovereignty over and title thereto vested sovereignty over and title to the island in the United States.

It certainly must be in some one. It is not in Spain. It is not in Cuba if Cuba is not a power. It is, then, in no power but the United States.

(*b.*) Obviously this must equally be the case if by the conclusion and ratification of the Treaty of Paris the United States asserted and assumed the right to exercise sovereignty and dominion over that island, regardless of whether sovereignty and dominion were permanently undertaken, or as a mere temporary expedient, and regardless of whether at any time before the treaty the United States had recognized the independence of the Cuban people.

(*c.*) The facts must be plain before this Court will say that the United States has been guilty of such a breach of faith as the acquisition of Cuba in either manner would constitute.

President McKinley in his message of December 6, 1897, said:

> "There is no desire on the part of our people to profit by the misfortune of Spain. We have only the desire to see the Cubans prosperous and contented, enjoying that measure of self-control which is the inalienable right of man, protected in their right to reap the benefit of the exhaustless treasure of their country."
>
> President McKinley's First Annual Message, December 6, 1897.

Again:

> "Of the untried measures there remain only: Recognition of the insurgents as belligerents; recognition of the independence of

> Cuba; neutral intervention to end the war by imposing a rational compromise between the contestants, and intervention in favor of one or the other party. I speak not of *forcible annexation*, for that cannot be thought of. That, by our code of morality, would be *criminal aggression*."
>
> *Ibid.*

So that there might be no misunderstanding as to our attitude, the joint resolution declared:

> *Fourth.*—That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said Island, except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people."

In his annual message of December 5, 1899, President McKinley said:

> "The pledge contained in this resolution is of the highest honorable obligation, and must be sacredly kept."

While the Treaty of Paris effected a cession of Porto Rico, the Phillipines and Guam, the American commissioners naturally refused to accept a cession of Cuba. They did more than this, they refused to admit that Spain possessed sovereignty over, or title to, the Island. This is obvious from the language of the treaty. Spain did not surrender her sovereignty or title. She merely "relinquished" her *claim* of sovereignty over, and title to, the Island.

During the negotiations the Spanish commissioners were distinctly advised of the exact position of this government:

> "Not having taken up arms for its own advancement, having refrained from acquiring sovereignty over Cuba, the United States now seeks to attain a peace consistent with its ends and purposes in waging war. * * * Its

relations to Cuba have been those of a people suffering without reward or the hope thereof."

Treaty and Protocols, p.

The pacification of the island was practically accomplished when the treaty was signed, on the 12th of December, 1898. It certainly was pacified at the time of the evacuation of the island by the Spanish troops, so that after that time there was no occasion for the exercise of the sovereignty, jurisdiction or control contemplated by the joint resolution.

"The withdrawal of the authority of Spain from the island of Cuba was effected by the 1st of January, so that *the full re-establishment of peace* found the relinquished territory held by us in trust for the inhabitants," &c.

President McKinley's Message of Dec. 5, 1899.

(*d.*) If, in view of these repeated avowals, the United States did nevertheless assume sovereignty or dominion over Cuba after its pacification had been accomplished this Government has placed itself in a very unenviable position before the world.

Said George Washington in his farewell address:

"I hold the maxim no less applicable to public than to private affairs, that honesty is the best policy."

Sparks' Washington, Vol. XII., p. 214.

Commenting upon the unwarranted action of the American Minister at Honolulu in causing a detachment of armed marines from the *Boston* to land on pretext of protecting American life and property, but really in aid of a movement against the then existing monarchy, and as a result of which the Hawaiian government was in January, 1893, in fact overthrown, President Cleveland said:

"Our country was in danger of occupying the position of having actually set up a

> temporary government on foreign soil for the purpose of acquiring through that agency territory which we had wrongfully put in its possession. The control of both sides of a bargain acquired in such a manner is called by a familiar and unpleasant name when found in private transactions. * * * It has been the boast of our Government that it seeks to do justice in all things without regard to the strength or weakness of those with whom it deals. I mistake the American people if they favor the odious doctrine that there is no such thing as international morality, that there is one law for a strong nation and another for a weak one, and that even by indirection a strong power may with impunity despoil a weak one of its territory."
>
> *President's Message relating to the Hawaiian Islands, December* 18, 1893.

Speaking of the high standard of honor and morality which it has always been the policy of the United States to apply in its international relations, he said:

> "On that ground it cannot allow itself to refuse to redress an injury inflicted through an abuse of power by officers clothed with its authority and wearing its uniform; and on the same ground, *if a feeble but friendly State is in danger of being robbed of its independence and its sovereignty by a misuse of the name and power of the United States, the United States cannot fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation.*"
>
> *Ibid.*

(*e.*) We repeat, therefore, that the evidence must be very strong before this Court can say that notwithstanding our repeated protests to the contrary, we have in fact made Cuba a part of our own dominion.

We will not discuss the facts upon which the theory of the existence of American sovereignty

in Cuba may be urged. It is sufficient to say that the treaty itself contains many provisions which seem to warrant the claim, and that there are several instances of Congressional legislation also available for that purpose.* We know, moreover, that foreign governments accredit their consular representatives in Cuba to the United States, and that these officials receive their exequaturs from our Secretary of State.

(*f.*) If this court shall decide that the political power has assumed jurisdiction and sovereignty in Cuba, and have made declarations and assertions clearly indicating an intention to treat that Island as within our national authority and dominion, the courts are bound by such governmental acts, and must treat that Island as exclusively within the sovereignty of the United States, and the responsibility of maintaining the national authority as so determined rests with the executive and legislative branches of the government.

Foster *v.* Neilson, 2 Peters, 253, 309.
Williams *v.* Suffolk Ins. Co., 13 Peters, 420.
United States *v.* The James G. Swan, 50 Fed. Reps., 108, 111.

"If those departments which are entrusted
"with the foreign intercourse of the nation,
"which assert and maintain its interests
"against foreign powers, have unequivocally
"asserted its rights of dominion over a coun-

* 30 Stat., 211, increasing the pay of officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii and Alaska; 30 Stat., 1074, concessions, franchises, &c., not to be granted during military occupation; 31 Stat., 70 (chap. 159), appropriating $30,000 for the relief of American seamen in foreign countries and shipwrecked seamen in Alaska, Hawaiian Islands, Cuba, Porto Rico and the Philippines; 31 Stat., 658 (ch. 797), providing "better facilities for the safekeeping and disbursement of public moneys in the Philippine Islands, and in the Islands of Cuba and Porto Rico," &c.

> " try of which it is in possession and which
> " it claims under a treaty; if the Legislature
> " has acted on the constitution thus asserted,
> " it is not in its own courts that this consti-
> " tution is to be denied."
>
> Chief Justice Marshall in Foster *v.* Neilson, *supra.*

If Cuba is within the sovereignty of the United States it is, of course, not "a foreign territory" within the meaning of the Act of June 6, 1900.

If Cuba is not "a foreign territory," it follows that the act does not authorize the appellant's detention, and he must be discharged from custody regardless of the legality or illegality of the government at present maintained in Cuba.

ELEVENTH.—Neither of the alleged offenses set forth in the complaint, upon which the Circuit Judge issued his warrants, constituted a violation of any of "the criminal laws in force" in Cuba within the meaning of the Act of June 6, 1900.

The statute was evidently intended to confine extradition to the specified offenses, and even then, surrender is only permissible when it is shown that the person charged has "violated the criminal laws in force" in the occupied territory.

In this case two offenses are charged, viz:

(1) A violation of "Chapter X., Article 401 of the Penal Code";
Record, p. 8 (18), p. 11 (23),

(2) A violation of "Sections 37 and 55 of the Postal Code of the said Island of Cuba";
Ibid, p. 9 (21), p. 12 (26).

It being conceded that the President is at present governing Cuba by force of the army under his command, this Court will take notice of the character and origin of the laws which the Military Governor asserts are, in fact, in force in that island.

United States *v.* Philadelphia, 52 U. S., 609.
United States *v.* Perot, 98 U. S., 428.
United States *v.* Chaves, 159 U. S., 452.
De Celis' case, 13 Court of Claims Rep., 117.

If he is mistaken in asserting that the laws which this appellant is charged with violating are in operation, or if it is apparent that they never had any validity, then the appellant is entitled to his discharge.

(*a.*) Referring to a recent translation of the Penal Code of Cuba and Porto Rico, which we assume is the Code upon which the government relies,* we find that Article 401 provides that;

> "The public employee who, by reason of
> "his office, has in his charge public funds or
> "property and who should take (or consent
> "that others should take) any part there-
> "from shall be punished"—

with the penalty of "*presidio mayor*" if the amount taken "exceeded 6,250 and did not exceed 125,000 *pesetas*" (p. 85).

And—

> "In every instance, with a penalty ranging from temporary especial disqualification,

*The Penal Code of the Islands of Cuba and Porto Rico, Translated into English, with Explanatory Notes and a Glossary of Spanish Terms. La Propaganda Literaria, Havana, October, 1898.

in its maximum degree, to perpetual absolute disqualification."

By turning to Article 24 we find that "*presidio mayor*" is an "exemplary punishment" ("*penas aflictives*"), in which category are also included "perpetual absolute disqualification," "temporary absolute disqualification," "perpetual especial disqualification" and "temporary especial disqualification." The result of "absolute" disqualification are defiined in Article 30. Article 24, however, explains that "especial" disqualification is "from public office, the right of suffrage, active and passive, profession or trade."

Article 27 provides that the penalty of *presidio mayor* "shall last from six years and a day to twelve years."

Article 56 declares that—

> "The penalty of *presidio mayor* shall carry along with it those of temporary absolute disqualification in its fullest extent, and subjection to surveillance of the authorities for a period equal to that of the principal penalty, which shall begin to be reckoned from the completion of the same."

This Code was promulgated by a Spanish royal decree in May, 1879. It was a revision of the Penal Code of 1870.

Lloyd McKim Garrison in Harvard Law Review, June, 1899.

From this resulted the provisions regarding treason, "crimes that endanger the peace or independence of the State," "lese-majeste," "crimes against the cortes and its members," "against the Council of Ministers," "against the form of government," "crimes committed by individuals or public func-

tionaries, on the occasion of or against the exercise of, individual rights guaranteed by the constitution," or "in violation of the constitutional provisions relating to religion and worship," "rebellion," "sedition," "criminal attempts against authority and its officers, resistance and disobedience," "acts of disrespect, insults, outrages and threats against its authority, its officers and other functionaries," and "public disorders."

Book II., Title I., Ch. I. & II.; Title II., Ch. I. & II.; Title III., Ch. I.–VI.

> "One deduces from this," says Mr. Garrison "that the Spanish monarchy relies on force for its continuance, since the Code penalizes acts that the patriotic love of a free people would make impossible. * * * Of course these purely political provisions relating to the Crown and Government of Spain fell with the treaty of Cession, and have become mere historical curiosities, like the fateful clause that punished with death as rebels all 'who rise with public and overt hostility' 'to proclaim the independence of the islands of Cuba and Porto Rico, or either of them' (Art. 237)."

Article 7 provides:

> "Crimes that may be penalized by special laws are not subject to the provisions of this Code."

Article 634 declares:

> "All the general penal laws existing prior to the promulgation of this Code are hereby abrogated, excepting those relating to crimes not subject to its provisions."

Book II. treats "of crimes and their penalties."

Title VII. of this book is entitled "of offenses committed by public employees in the course of their employment."

Chapter X. of Title VII. is entitled "of the malversation of public funds," and consists of six articles, 401 (already quoted) to 406.

Considering the source of the Code, its object and its language, can it be reasonably said that an employee of the Department of Posts, established by the United States military authorities, is a "public employee" within the meaning of this section?

Is it not perfectly clear that only employees of the Spanish government were within its contemplation?

It seems to us manifest that a civilian employee of the United States Military establishment in Cuba, holding office under the United States Government, and in no manner subject to the supervision or control of any Cuban authority, cannot be said to be a "public employee" within the meaning of that term as the same was used by the authors of the Code, or within their remotest contemplation.

But in any event, it seems that under a royal decree promulgated in 1882 crimes committed by military or administrative officers cannot be

> "punished *until their superiors have heard the case and turned the offender over to the criminal law for trial.*"
>
> Harvard Law Review, June, 1899, p. 129; Statement of facts enclosed with Mr. J. Estrada Palma's letter to the Secretary of State, December 7, 1895, Appendix A, "Cuba *v.* Spain, 54th Cong., 2d Sess., Senate Report No. 1160, p. 80.

Since the superior officers have not heard the case against this defendant, nor turned him over to the criminal law for trial it is obvious the present proceeding is wholly premature.

(*b.*) The so-called "Postal Code of the Island of Cuba" is without legal force or effect.

The President "has his appropriate sphere of duty, which is to execute, not to make the laws."

Ex parte Milligan, 71 U. S., 121.

Benjamin R. Curtis said in 1862:

> "Besides, all the powers of the President are executive merely. He cannot make a law. He cannot repeal one. He can only execute the laws. He can neither make nor suspend nor alter them. He cannot even make an article of war."

The Postal Code is the act of the President through the Military Governor. If it is without authority under our constitution or laws, it has no force in Cuba, and an alleged violation of its provisions does not constitute a violation of "the criminal laws in force therein."

(*c.*) Since neither the Penal Code of Cuba and Porto Rico, nor the Postal Code apply, and there being no other law in force in Cuba covering the case, it is clear that for this reason and quite regardless of any other consideration the defendant is entitled to his release.

TWELFTH.—Summary of the argument.

1. If by the Act of June 6, 1900, Congress intended to authorize extradition to Cuba during the existence of the present military establishment in that island, the Act is unconstitutional and void, because its enforcement would—

   (*a*) subject accused persons, not in the military service, to the jurisdiction of a purely military government in time of absolute peace.

(*b*) deprive accused persons of the most sacred rights and privileges guaranteed by the Constitution, viz.: indictment, trial by jury, &c.

2. If the act does not authorize extradition to Cuba, then the appellant's arrest and detention is illegal and without authority of law.

CONCLUSION.—The order of the Circuit Court should be reversed, and the cause should be remanded, with directions to discharge the defendant from custody under the warrants issued pursuant to the Act of June 6, 1900.

DeLancey Nicoll,
John D. Lindsay,
Of Counsel for the Appellant.

Office Supreme Court
FILED
DEC 1 1900
JAMES H. McKENNEY,
Clerk

No. 406.
Brief of Lindsay for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 406.

Filed Dec. 1, 1900.

CHARLES F. W. NEELY, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MEMORANDUM SUBMITTED BY THE APPELLANT.

JOHN D. LINDSAY,
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30152

Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 406.

CHARLES F. W. NEELY, Appellant,

vs.

WILLIAM HENKEL, United States Marshal in and for the Southern District of New York.

MEMORANDUM SUBMITTED BY THE APPELLANT.

This is an appeal from a final order of the Circuit Court of the United States in and for the Southern District of New York, entered August 20, 1900, denying a second application by the appellant for a writ of *habeas corpus*, whereby he sought to secure his release from the custody of the appellee in the proceedings instituted under the Act of June 6, 1900 (31 Stat., 656), for his extradition to Cuba.

The record shows precisely the same state of facts as that developed in No. 387, with these differences:

In place of the 7th subdivision of Paragraph III. of the petition in 387 (p. 2), the petition in this case contains the following averments:

> "7. That at the conclusion of the said proceedings, to wit, on the said 24th day of July, the said Circuit Judge remanded your petitioner to the custody of the said United States

Marshal under the said warrants, pending and until his decision of the question whether the evidence so introduced before him, as aforesaid, established probable cause that your petitioner was guilty of the offenses charged in the said complaints, or of either of the offenses so charged, and thereupon placed upon each of the said warrants an endorsement in the following language, to wit:

"Remanded till decision July 24, 1900. E. H. LACOMBE, *U. S. C. J.*"

8. That hereafter, to wit, on the 8th day of August, 1900, the said Circuit Judge handed down an opinion, a copy of which is hereto annexed, marked 'E,' but that no decision in the premises has yet been entered.

9. That the evidence in the said proceedings under the said warrants before the said Circuit Judge has not yet been certified to the Secretary of State, and that no order has yet been issued in the said proceeding for your petitioner's return and surrender to the authorities in control in Cuba for trial under the laws there in force, but that your petitioner is now virtually imprisoned and restrained of his liberty by the said William Henkel, Esquire, United States marshal, as aforesaid, in the said proceeding claiming to so restrain your petitioner by color of the pretended authority of the said warrants of arrest and the said remands thereunder, and pending the decision of the said Circuit Judge, as aforesaid.

10. Your petitioner is informed and verily believes that, notwithstanding the facts as above alleged, the said marshal, on the 13th day of August, 1900, placed upon each of said warrants an endorsement and certificate in which he, the said marshal, stated and certified (among other things) as follows: 'And I further certify that the within named Charles F. W. Neely is not and has not been detained by me by virtue of this warrant, and the same has not been executed, and I have made no return of the same.'"

Record, pp. 2–3.

The petition in this case also contains the following additional allegation:

> "XIII.—That your petitioner is convinced that it would be unwise and prejudicial to his interests to defer the making of this application until the issuance of a final order of extradition herein, for the reason that, as your petitioner is informed and verily believes, the United States Government authorities have made arrangements for the placing of the petitioner on board a Government transport or other vessel for immediate transportation to Cuba as soon after the issuance of such an order as may be, and in such prompt manner, and under such circumstances, as will prevent, and are intended to prevent, your petitioner from making an application for a writ of *habeas corpus* at that time; and your petitioner verily believes that unless he makes the same before said order is issued he will be absolutely deprived of the benefit of such relief, and of all opportunity to secure a review of the constitutional questions herein presented."
>
> *Ibid*, p. 8.

In other respects the record in this case is (*mutatis mutandis*) practically the same as that in No. 387.

The purpose of the allegations regarding the Circuit Judge's remand of the appellant was to demonstrate beyond all controversy the fact that the appellant was actually detained and restrained under the warrants in the extradition proceeding.

The purpose of the subsequent averment was to show the necessity of prompt action to preserve the appellant's legal rights.

We do not regard these allegations as in any way changing or affecting the situation. They were inserted merely that the real facts might appear of record.

Upon the grounds urged in our brief in No. 387 we submit that the order of the CircuitCourt of August

20, 1900, should also be reversed, and the cause remanded, with directions to discharge the appellant from custody under the warrants in the extradition proceeding.

Respectfully submitted,

JOHN D. LINDSAY,
Counsel for the Appellant.

Office Supreme Court U. S.
FILED
DEC 8 1900
JAMES H. KELLEY, Clerk

No. 384.

Sup. Ct. of Mod. Sundries

Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Filed Dec 8, 1900.

CHARLES F. W. NEELY, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF FOR THE APPELLANT.

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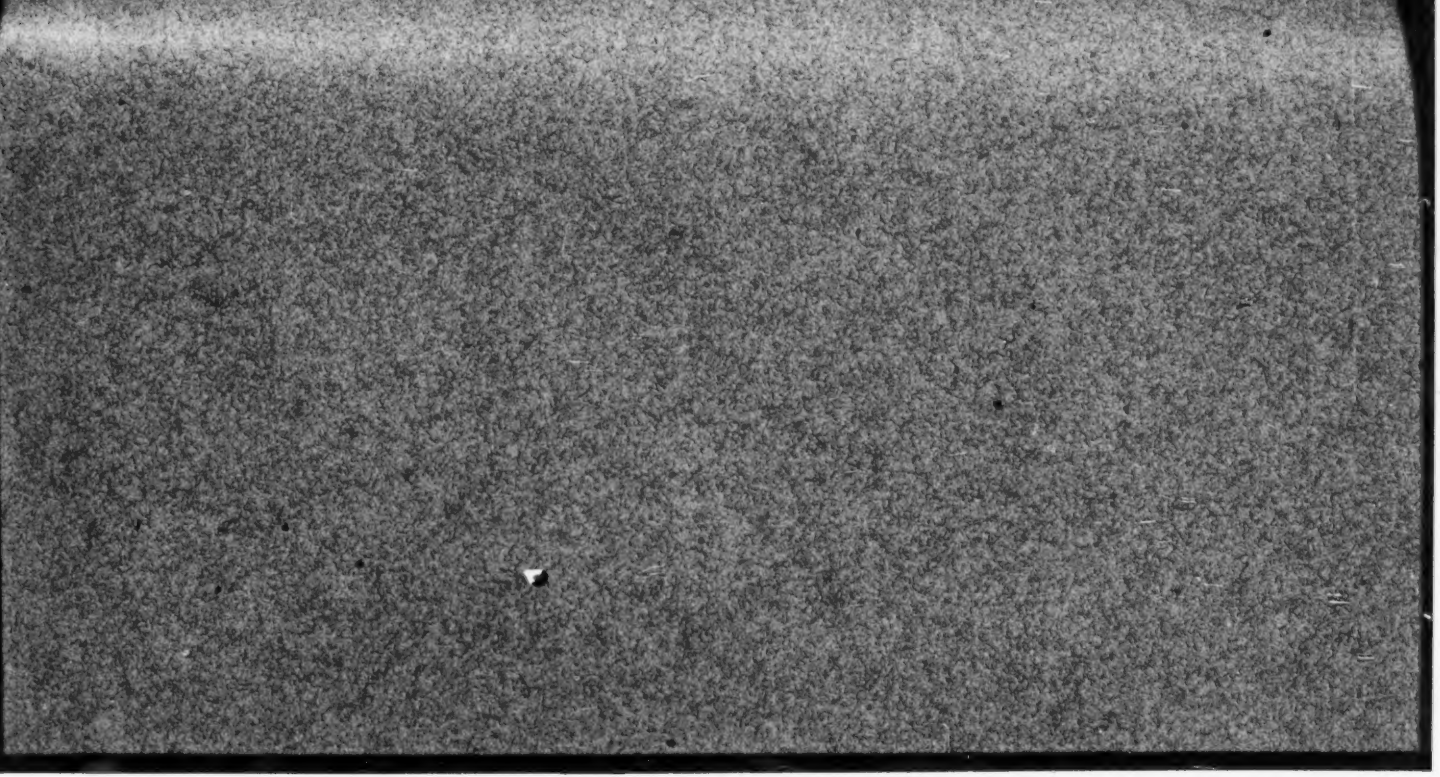

30155

Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 387.

CHARLES F. W. NEELY, Appellant,

vs.

WILLIAM HENKEL, United States Marshal in and for the Southern District of New York.

SUPPLEMENTAL BRIEF FOR THE APPELLANT.

FIRST.—The Act of June 6, 1900, is, in effect, a treaty or compact with a foreign state, the power to make which is by the Constitution vested exclusively in the President and the Senate.

The establishment of a system whereby a government obligates itself to surrender fugitives charged with offenses in the territory of a foreign nation, and to thereby subject them to criminal prosecution in such foreign place, either with or without conditions as to their future treatment and trial, is, in effect, and to all practical intents and purposes, a treaty. It certainly is the assumption of a relation toward a foreign government. All power con-

cerning foreign relations of this character is by our Constitution vested exclusively in the President and the Senate, who together constitute what is known as the treaty-making power.

Any legislation by Congress which deals, directly or indirectly, with matters thus committed to the diplomatic branch of the government, is an unlawful and unauthorized usurpation of that power, and hence a plain violation of the Constitution.

(*a.*) In the celebrated case of Holmes *v.* Jennison, 14 Peters, 540, which came before this Court in 1840, the plaintiff in error was arrested in the State of Vermont, on a warrant issued by the Governor of that State, directed to John Starkweather, Sheriff of Washington County,

> "setting forth that an indictment had been found by a grand jury of the District of Quebec, in the British Province of Lower Canada, against said Holmes, for the crime of murder, * * * and that, as it was fit and expedient that he should be made amenable to the laws of the county where the offense was charged to have been committed, the said Starkweather was commanded to convey the body of the said Holmes to some convenient place on the confines of the State of Vermont and the Province of Lower Canada, and there deliver him to such persons as might be empowered by the Canadian authorities to receive him, to the end that he might be there dealt with as to law and justice appertained."
>
> 14 Peters, 561.

At this time the stipulation between this and the British Government for the mutual delivery of fugitives from justice "was no longer in force," and "the renewal of it" was "a subject of negotiation between the two governments."

Ibid., p. 542.

Holmes was taken before the Supreme Court of Vermont on *habeas corpus*, and a motion was made for his discharge

"upon the ground of the insufficiency of the cause alleged for his detention, as being at variance with the provisions of the Constitution of the United States."

Ibid.

The Vermont Court rendered judgment against the application, and ordered the prisoner to be remanded, whereupon a writ of error was sued out and prosecuted in this court, where it was argued that the surrender of persons charged with crimes in foreign countries was a subject wholly of a national character which had been exclusively committed by the Constitution to the treaty-making power; and hence that the act of Governor Jennison was a plain usurpation of that power. The Court being equally divided on the question of jurisdiction the writ was dismissed; but the views of Chief Justice Taney so plainly upheld the plaintiff in error's contention, and are so much in point here, that while perhaps not controlling in the present case, we venture to quote them. He said:

> "The power which has thus been exercised by the State of Vermont is a part of the foreign intercourse of this country, and has undoubtedly been conferred on the federal government. Whether it be exclusive or not is another question, of which we shall hereafter speak. But we presume that no one will dispute the possession of this power by the general government. *It is clearly included in the treaty-making power, and the corresponding power of appointing and receiving ambassadors, and other public ministers.* The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it, and, consequently, it was designed to include all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty; and which are consistent with the nature of our institutions, and the distribution of powers between the general and State gov-

ernments. And without attempting to define the exact limits of this treaty-making power, or to enumerate the subjects intended to be included in it, it may safely be assumed that the recognition and enforcement of the principles of public law, being one of the ordinary subjects of treaties, were necessarily included in the power conferred on the general government. And, as the rights and duties of nations towards one another, in relation to fugitives from justice, are a part of the law of nations, and have always been treated as such by the writers upon public law, it follows that the *treaty-making power must have authority to decide how far the right of a foreign nation in this respect will be recognized and enforced*, when it demands the surrender of any one charged with offenses against it."

And further:

"It being evident, then, that the general government possesses the power in question, it remains to inquire whether it has been surrendered by the states. We think it has; and upon two grounds. 1. According to the express words of the Constitution, it is one of the powers that the state are forbidden to exercise without the consent of Congress. 2. It is incompatible and inconsistent with the powers conferred on the federal government."

* * * * * *

In speaking of the treaty-maker power conferred on the general government, we have already stated our opinion of the meaning of the words used in the Constitution, and the objects intended to be embraced in the power there given. Whatever is granted to the general government is forbidden to the States, because the same word is used to describe the power denied to the latter, which is employed in describing the power conferred on the former; and it is very clear, therefore, that Vermont could not have entered into a treaty with England, or the Canadian government, by which the State agreed to deliver up fugitives charged with offenses committed in Canada.

But it may be said that here is no treaty; and, undoubtedly, in the sense in which that

word is generally understood, there is no treaty between Vermont and Canada. For when we speak of "a treaty," we mean an instrument written and executed with the formalities customary among nations; and as no clause in the Constitution ought to be interpreted differently from the usual and fair import of the words used, if the decision of this case depended upon the word above mentioned, we should not be prepared to say that there was any express prohibition of the power exercised by the State of Vermont.

But the question does not rest upon the prohibition to enter into a treaty. In the very next clause of the Constitution, the States are forbidden to enter into any "agreement" or "compact" with a foreign nation; and as these words could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive.

* * * * * *

The word "agreement," does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, it is an "agreement." And the use of all of these terms, "treaty," "agreement," "compact," show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a State and a foreign power: and we shall fail to execute that evident intention, unless we give to the word "agreement" its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.

* * * * * *

Every one will admit that an agreement formally made to deliver up all offenders who, after committing crimes in Canada, fly for shelter to Vermont, would be unconstitutional

on the part of the state. So an agreement, after Holmes had escaped to Vermont, written and signed by the state and provincial authorities, by which the Governor of Vermont engaged to seize him and deliver him up to the Canadian officers, would, unquestionably, be unconstitutional. Yet precisely the same thing is done in this case, without a regular and formal agreement. It is, in some way or other, mutually understood by the parties that he shall be seized and delivered up; and he is seized, accordingly, in order to be delivered up, pursuant to this understanding. Can it be supposed that the constitutionality of the act depends on the mere form of the agreement? We think not. *The Constitution looked to the essence and substance of things, and not to mere form.* It would be but an evasion of the Constitution to place the question upon the formality with which the agreement is made. The framers of the Constitution manifestly believed that any intercourse between a state and a foreign nation was dangerous to the Union; that it would open a door of which foreign powers would avail themselves to obtain influence in several States. Provisions were, therefore, introduced to cut off all negotiations and intercourse between the State authorities and foreign nations. If they could make no agreement, either in writing or by parol, formal or informal, there would be no occasion for negotiation or intercourse between the State authorities and a foreign government. Hence prohibitions were introduced, which were supposed to be sufficient to cut off all communication between them.

* * * * * *

The exercise of the power in question by the states is totally contradictory and repugnant to the power granted to the United States.

* * * * * *

The power in question, from its nature, cannot be a concurrent one, to be exercised both by the states and the general government. It must belong, exclusively, to the one or the other. If it were merely the power to surrender the fugitive, it might be concurrent; because either might seize and surrender,

> whose officers could first lay hold of him But the power in question, as has already been stated, is a very different one. It is the power of deciding the very delicate question whether the party demanded ought or ought not to be surrendered. And in determining this question, whether the determination is made by the United States or a state, the claims of humanity, the principles of justice, the laws of nations, and the interests of the Union at large, must all be taken into consideration, and weighed when deliberating on the subject. Now, it is very evident that the councils of the general government and of the state may not always agree on this subject. The decision of the one may stand in direct opposition to the decision of the other. How can there be a concurrent jurisdiction in such a case? They are incompatible with each other, and one must yield. And it being conceded on all hands that the power has been granted to the general government, it follows that it cannot be possessed by the states; because its possession on their part would be totally contradictory and repugnant to the power granted to the federal government.

Substitute the word "congress" for "state," and the views of the Chief Justice are directly in point; for plainly the function of the treaty-making power, viz., the President and the Senate, can be no more infringed or usurped by congress than by one of the states.

(*b.*) In the case of People *ex rel.* Barlow *v.* Curtis, 50 N. Y., 321, the Governor of the State of New York ordered the delivery to the Belgian authorities of Carl Vogt, charged with a crime in Belgium. The Governor acted in pursuance of a New York statute, passed in 1822 (1 R. S., 468, 5th ed.), providing for the surrender by the executive authority of the state of fugitives from foreign justice charged with "any crime, except treason, which by the laws of this state, if committed therein, is punishable by death, or by imprisonment in state prison."

In holding that the statute in question was a violation of the constitution of the United States, Chief Judge CHURCH, delivering the opinion of the Court of Appeals, speaking of the case of Holmes *v.* Jennison, said:

> "I think we should regard that case as an authoritative decision against the constitutionality of the act in question. Although the appeal was dismissed, yet the opinion of Chief Justice Taney upon the merits in favor of the discharge of the prisoner was concurred in by three of his associates, Story, McLean and Wayne, and, as to the merits, substantially by two others, although the latter agreed to a dismissal of the appeal upon other grounds.
>
> "The decision was regarded as binding upon the return of the case by the Supreme Court of Vermont; and the prisoner was discharged (12 Vt., 631). I am not aware of any adjudication since that time impairing the effect of this decision; and as the subject is one within the cognizance of the federal courts the question should be regarded as settled."

The learned Judge proceeded:

> "This is a much stronger case for holding the act of the governor invalid than the Vermont case. There the state had not acted at all. The act of the governor in issuing his warrant was not authorized by law, nor did it appear that any demand had been made by the Canadian government for the rendition of the prisoner; and one of the judges agreed to a dismissal of the appeal upon the latter ground. Here the state has made *a permanent regulation for the delivery of fugitives*, and the record shows that a formal demand was made upon the governor according to the terms of the statute. If the same facts had appeared in that case, a judgment discharging the prisoner would have been rendered.
>
> "In the next place, the elaborate and exhaustive opinion of Chief Justice Taney commends itself to our judgment as a correct ex-

position of the law on the subject, and it would be difficult to add anything to the force of his reasoning. It is admitted by the Attorney-General that the general government possesses the power over the subject of extradition of fugitives from justice, and that if it had exercised the power in regard to Belgium it would be exclusive, and that no one could be delivered except through the federal machinery; but he insists that this power is dormant as to all countries with which the government have made no treaty; that the states are not prohibited from exercising it, and that such exercise is not repugnant or inconsistent with the power conferred on the government. This position is not tenable. It is true that a grant of power to the general government does not necessarily operate as a prohibition of the same power by the states (Sturges *v.* Crowninshield, 4 Wheat., 122). There are subjects over which the general government and the states may exercise concurrent authority. If the terms of the grant are not exclusive, and there is no express prohibition upon the states, and no repugnancy or inconsistency in its exercise by the states, the authority is concurrent.

"This subject is not one of that character. *The whole subject of foreign intercourse is committed to the federal government.* Indeed, this was one of the principal purposes of the Union. *As to foreign countries, the states, as such, are unknown. The treaty-making power is exclusive in the general government not only, but the states are prohibited from exercising it in express terms.* So the appointment of ambassadors and receiving ambassadors from foreign countries are confided to the Union, and the states are prohibited from making any compact or agreement with any foreign power. The act of the legislature under consideration authorizes foreign ministers and officers of foreign governments to make a demand upon the governor, and empowers him to treat with these ministers, and accede, in his discretion, to their demand. It is patent that the exercise of such a power by the states may frustrate the foreign policy of the government,

> both as to the countries with which the government has made a definite treaty, and as to those with which it has not."

And further:

> "Again, it *being conceded that extradition is included within the treaty making power*, if the states may regulate it why may they not regulate any other question included in that power? Although expressly prohibited from entering into a treaty, the regulation of the proper subjects of it is a practical exercise of the power which renders the prohibition nugatory. In any view of the question the repugnance is clear. I think also that the express prohibition against making an agreement with a foreign power is violated by the act of the legislature."

(*c.*) The reasoning of these cases seems to us absolutely convincing. Every suggestion urged as a reason against the usurpation of the treaty-making power by the states applies with equal force to similar usurpation by Congress. The determination by Congress of the questions of expediency in respect to extraditionary arrangements would be as inappropriate and out of place as the determination by that body of all other matters affecting our foreign relations.

See our main Brief, pp. 102–103.

(*d.*) We submit, therefore, that if Cuba is a foreign state, and even granting for the sake of argument that its government is being temporarily administered by the President "in trust" (not for the United States) for its inhabitants, Congress has no more right to make a treaty with its governmental representatives than any state would have. Certainly, if Cuba is a state with whom we might make a treaty, then we cannot deliver fugitives from justice to her by act of Congress.

If Cuba is not a foreign state, then (assuming the statute was intended to apply to that island), while

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it may not be a usurpation of the treaty-making power, it is nevertheless unconstitutional and void for the other reasons already advanced.

Of course, if Cuba is not a foreign place at all, then the appellant is illegally detained under the act.

SECOND.—In reply to the argument of the Government.

I.

The learned counsel for the Government contends that—

> "The United States is at the present time the *de facto* and *de jure* sovereign in the Island of Cuba, and as such is possessed of all essential attributes of sovereignty, and such sovereignty is not affected by the fact that its duration may be limited in time or exercised for a specific object."
>
> Brief for the United States, .

He says that—

> "there is not and never has been a Cuban Government possessing sufficient attributes of sovereignty to warrant its recognition by the family of nations."
>
> *Ibid.*, .

And again:

> "Cuba is therefore 'territory *pro tempore*' of the United States * * * occupied by our soldiers, both under the war-making power and the treaty-making power," &c.
>
> *Ibid*, .

(*a.*) This was indeed the view taken in the New Orleans case cited by counsel,

> Louisiana *v.* Cox, *Ibid.*, ,

where it was held that Cuba is "a Territory of the United States" within the meaning of Section 1038 of the Revised Statutes of Louisiana, since it is a place

> "over which the United States exercises *con-*
> "*trol, sovereignty, domain and occupation.*"
> *Ibid.*,

If this is so, it naturally follows, as we have already urged, that the Island of Cuba is not "foreign territory," and that the Act of June 6, 1900, therefore does not authorize the appellant's extradition.

Plainly a place cannot be "foreign" to the United States if it is within the national jurisdiction and dominion, and subject to its absolute and undisputed sovereignty and control. If Cuba is "'territory *pro tempore*' of the United States," and therefore without the dominion or jurisdiction of any other sovereignty, it is domestic and not foreign territory.

(*b.*) While it is true that "conquered territory does not become a recognized and permanent part of the United States until the political branch of the government asserts it as such" (Brief for the United States, p. 15) yet if Cuba is "land appertaining to the United States" by reason of conquest *and treaty stipulation*, and subject to our jurisdiction and dominion *pro tempore*" as the government insists it is (*Ibid*), then the political branch of the government *has* accepted it as a part of the United States, and it is now "territory or other property belonging to the United States," in dealing with which all "the agencies of the general government" must observe the constitutional limitations affecting "the fundamental rights of life, liberty and property."

> Mr. Justice Harlan in Callan *v.* Wilson,
> 127 U. S., 540.

It was held in Fleming *v.* Page, 9 How., 603, that Tampico did not cease to be foreign upon its occupa-

tion *by our military forces.* But this was because the political branch of our government had not asserted dominion and sovereignty, or otherwise exercised authority there, as it has in Cuba. The President is not the political branch. He cannot enlarge the limits of the United States.

> "This can only be done by the treaty-making power or the legislative authority. * * * His (the President's) duty and his power are purely military. * * * But his conquests do not enlarge the boundaries of the Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power."
>
> 9 How., 603.

In *United States* v. *Rice*, 4 Wheat., 246, the town of Castine, in Maine, was captured by the British troops on September 1, 1814, and was held until the conclusion of the war in February, 1815 During this period the British Government exercised all civil and military authority over the place, and established a custom-house and admitted goods to be imported according to regulations established by itself. After the conclusion of the treaty of peace, and the surrender of Castine to our troops, our Government sought to collect the tariff duties on goods which had been imported into Castine by one of its citizens during its military occupation by the British army. In an opinion by Mr. Justice Story this court held that such duties could not be exacted, saying:

> "By the conquest and military occupation of Castine the enemy acquired that *firm possession* which enabled him to exercise *the fullest rights of sovereignty* over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a *temporary allegiance to the British Government,* and

> were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty there can be no claim to obedience."

Both of these decisions fully recognize the principle that territory is "foreign" when our sovereignty and dominion does not extend to, or has been suspended over it. It follows that territory over which our sovereignty and dominion does extend, and is conceded by the political branch of the Government to extend in the fullest and amplest degree, cannot be regarded as foreign.

II.

It is argued that the provisions of the Constitution regarding indictment by grand jury and trial by jury and others

> "governing the procedure in criminal cases do not apply to the territories of the United States, unless Congress expressly makes the constitution applicable to such newly acquired territories."
>
> Brief for the United States.

In support of this proposition some remarks are quoted from an address of the Solicitor-General before the Pennsylvania Bar Association in June last, wherein that gentleman having assumed that

> "the constitutional guarantees relating to indictment by a grand jury and trial by a petit jury are *not fundamental in character*, and therefore do not tie the hands of *the inhabitants of a territory* when organizing a state,"

proceeds to inquire,

> "how can they tie the hands of the President and Congress ... preserving order and protecting life and property in our new possessions?"

With what seems to the learned counsel for the appellee "admirable clearness and convincing force," the Solicitor-General then lays down the proposition that because the President had found in these "new possessions"—"no grand juries, no petit juries, no machinery for punishing crime by the processes of the Anglo-Saxon law,"—

> "these guaranties must be held inoperative or the preservation of peace and order and the protection of life and property be abandoned,"

because, otherwise crime could be punished in no other way, the United States being unable to supply these "*impossibilities*."

(*a.*) It does not seem to have occurred to the Solicitor General that a grand and petit jury system might have been organized as readily in Cuba (with the inhabitants of which Island we were certainly on better terms than Gen. Kearney found the natives in the places he conquered) as, under far more difficult circumstances, it was established in Louisiana and the former Mexican possessions as soon as they came under our control.

(*b.*) The alternative that, "until the progress of the people" in new territory, the provisions of our Constitution are to be "held inoperative," or "the preservation of peace and order and the protection of life and property be abandoned," brings us back to the argument of "necessity" which this Court long since utterly repudiated as annihilative of the underlying theories of our Government.

See our main Brief, p. 139.

(*c.*) It is quite true that this Court has held that *the States* may do away with some of the methods of common law procedure applicable to criminal prosecutions, *e. g.*, grand juries, trial by jury, &c., without violating the Constitution, but this solely upon the ground that the provisions of the Consti-

tution in this regard were binding only upon the Federal Government, and not upon the States, which has never surrendered to the general government the right to determine the practice and procedure of their courts.

Holden *v.* Hardy, 169 U. S., 366.

The case just cited involved the constitutionality of an act of the legislature of the *State* of Utah which prohibited the employment of workingmen in underground mines, smelters, &c., for more than eight hours a day, and declared any violations of the act to be a misdemeanor. The statute was assailed as repugnant to the constitution and particularly to the Fourteenth Amendment, in abridging the privileges or immunities of citizens of the United States, depriving both the employer and employee of property without due process of law, and denying them the equal protection of the laws. It was upheld (Justices Brewer and Peckham dissenting) as a valid exercise of the police power of the state, viz., as a measure tending to the protection of public health.

Speaking of the various cases wherein this court had construed the Fourteenth Amendment (which for the first time authorized the federal courts (p. 382) to "declare invalid all laws and judicial decisions of the states abridging the rights of citizens or denying them the benefit of due process of law"), Mr. Justice Brown, delivering the opinion of this court, said (p. 383):

> "These cases may be divided, generally, into two classes: First, where a state legislature, or a state court is alleged to have unjustly discriminated in favor of or against a particular individual, or class of individuals, as distinguished from the rest of the community, or denied them the benefit of due process of law; Second, where the legislature has changed its general system of jurisprudence by abolishing what had been previously considered necessary to the proper administration of justice or the protection of the individual."

The learned counsel for the government quotes an extract from the language of Mr. Justice Brown, wherein it is suggested that the *annexation* of territory, "whose jurisprudence is that of the civil law," would not necessitate an abandonment of its traditions, laws and systems "and the substitution of a system with which its inhabitants" had no previous acquaintance or sympathy.

These observations (which were of course purely *obiter*) were made in a case where the Court was considering the extent of the police power of a *state* of the Union.

It was after adverting to a long line of decisions affecting the latter class, wherein the court had held that there is nothing in the federal constitution preventing a *State* from adopting any system of laws of judicature it saw fit, so long as such system did not violate the fundamental principles "to which each member is bound to accede as a condition of its admission as a *State*," that the learned justice made use of the language in question.

(*d.*) The distinction between the powers and attributes of the *States* of the Union as distinguished from those of the general government is well understood.

The former possesses all the sovereign rights and functions of independent sovereignties except so far as those rights and functions have been expressly surrendered to the general government by the Constitution, whereas the general government, while possessing only those powers enumerated in the Constitution—or, in other words, only the powers intended to be ceded to it by the States—is moreover limited in the exercise of its authority by many provisions which this Court has repeatedly held are not binding upon the States, *e. g.*, the first eight amendments.

Thus, while the *States* may abolish the grand jury system, trial by jury, or the forms of judicial procedure, and establish in their place any methods

compatable with modern ideas admirable in a Republican form of government and which do not violate those

> "immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard,"
>
> Holden *v.* Hardy, p. 389,

the limitations imposed upon the powers of the federal government by these fundamental provisions are binding and obligatory at all times and in all places.

No comment of ours can add force to the language of this court in the Milligan case where, in speaking of these very provisions, it was said (71 U. S., 2):

> "Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus.*"
>
> See Appellant's Brief, p. 160.

(*e.*) The Ross case (140 U. S., 453), as we have already shown (Appellant's Brief, p. 16), was decided, not upon the theory that our consular courts established in semi-civilized or barbarous countries under treaty stipulations exercise the jurisdiction or enforce the laws of the *United States*, but upon the far different principle that the treaty-making power may under our constitution competently accept, on behalf of our consular representatives, an "authority * * * in another country" under the immemorial usage of civilized nations, which the constitution makers must have had in mind when they established our system of government.

(*f.*) The case of Jones *v.* United States, 137 U. S., 202, is cited by the government. But there is nothing in that case which supprts its position. The decision of this Court was simply to the effect that the Courts of the United States had jurisdiction over offenses committed on certain guano islands which the political branch of the government had

determined "appertained to the United States," and which were therefore not only within its territorial, but its "sole and exclusive" jurisdiction. It was not suggested that in the prosecution of such offenses the government could deny the accused the rights and privileges accorded by the Constitution.

These privileges and immunities can scarcely be less recognized in a case arising in Cuba than in one arising in the Navassa Islands.

III.

The Attorney-General admits that—

> "To try him (the appellant) in New York for acts which were in fact committed in the distant City of Habana, would not be in accordance with the great constitutional principles of government which control the administration of justice in both England and America" (Brief for the United States).

But with what seems to us strange inconsistency, he argues that to try him in Cuba, without indictment or jury, under a system utterly repugnant to our ideas of natural right and justice, would entirely accord with these "great constitutional principles."

IV.

We do not contend that the United States is without power to deliver up to justice persons charged with offenses in territory *lawfully* occupied by it, whether or not such territory has been formally incorporated into the nationl domain; nor do we contend, nor have we suggested, that it is so

impotent as to be unable to protect life and property in any place within its lawful jurisdiction. Our position legitimately leads to no such *reductio ad absurdum*.

Nor do we dispute either of the propositions of the government: (1) that the United States has the right to extradite American citizens who are fugitive criminals, or (2) that, if the United States has acquired all the rights of sovereignty in Cuba it may legislate for the punishment of crime therein, and may provide a system of removal whereby offenders may be subjected to such punishment.

We merely insist that in the exercise of these powers the United States is limited to the use of constitutional methods and agencies.

For example no one would argue that the President could lawfully seize an American citizen, and cause his transportation to a foreign country, or even from one place to another in the United States, without "due process of law"; nor that Congress could lawfully authorize such a proceeding on the part of the President, or the courts in the discharge of their appropriate functions uphold it under the constitution. Nor can it be reasonably urged that congress in legislating for the punishment of crime in Cuba, or in any other place within the national jurisdiction, or in providing a rendition or extradition system in aid of such legislation, could violate any one of the constitutional powers which limit and control the legislative power.

If an individual (whether an American citizen, or "a citizen of Cuba," or a citizen of any other place on earth) should commit murder or arson or any other crime in Cuba, and then flee to the United States, there are doubtless ample means in our government whereby his surrender and prosecution may be constitutionally brought about.

What we do contend, and all that it is necessary for us to contend in this case, is that if the Act of June 6, 1900, applies to Cuba, it violates the constitution in the ways we have already pointed out.

V.

Chief Justice Marshall said in the well known case of McCulloch *v.* Maryland, 4 Wheat., 316:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."

Is the end here sought legitimate? Is it lawful for the President to maintain a military government in foreign territory in time of absolute peace? If so, may he, in the administration of the judicial system which he has made a part of such government, deny to accused persons the rights, privileges and immunities guaranteed by the Constitution from which he derives all his power and authority? May he "subject American citizens who are in the service of their own Government to the jurisdiction and capricious decisions of tribunals composed of persons alien in race and sentiment, administering a system of laws * * * which would not be tolerated in any American community"?

The Act of June 6, 1900, was concededly enacted as a means of lending aid and support to such a government, administered in the manner suggested, and of subjecting to its methods all persons accused of crime within the territory over which it extends, whether American citizens or not, who should flee to or be found in the United States.

Is this an end "within the scope of the Constitution"? This is the question which this Court is asked to determine. We have presented the considerations which seem to us to necessitate a negative answer.

Respectfully submitted,

DELANCEY NICOLL,
JOHN D. LINDSAY,
Of Counsel for the Appellant.

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No. 387 & 406.

Brf. of Atty. for Appellee.

Filed Dec. 10, 1900.

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In the Supreme Court of the United States.

October Term, 1900.

CHARLES F. W. [illegible], Appellant,

vs.

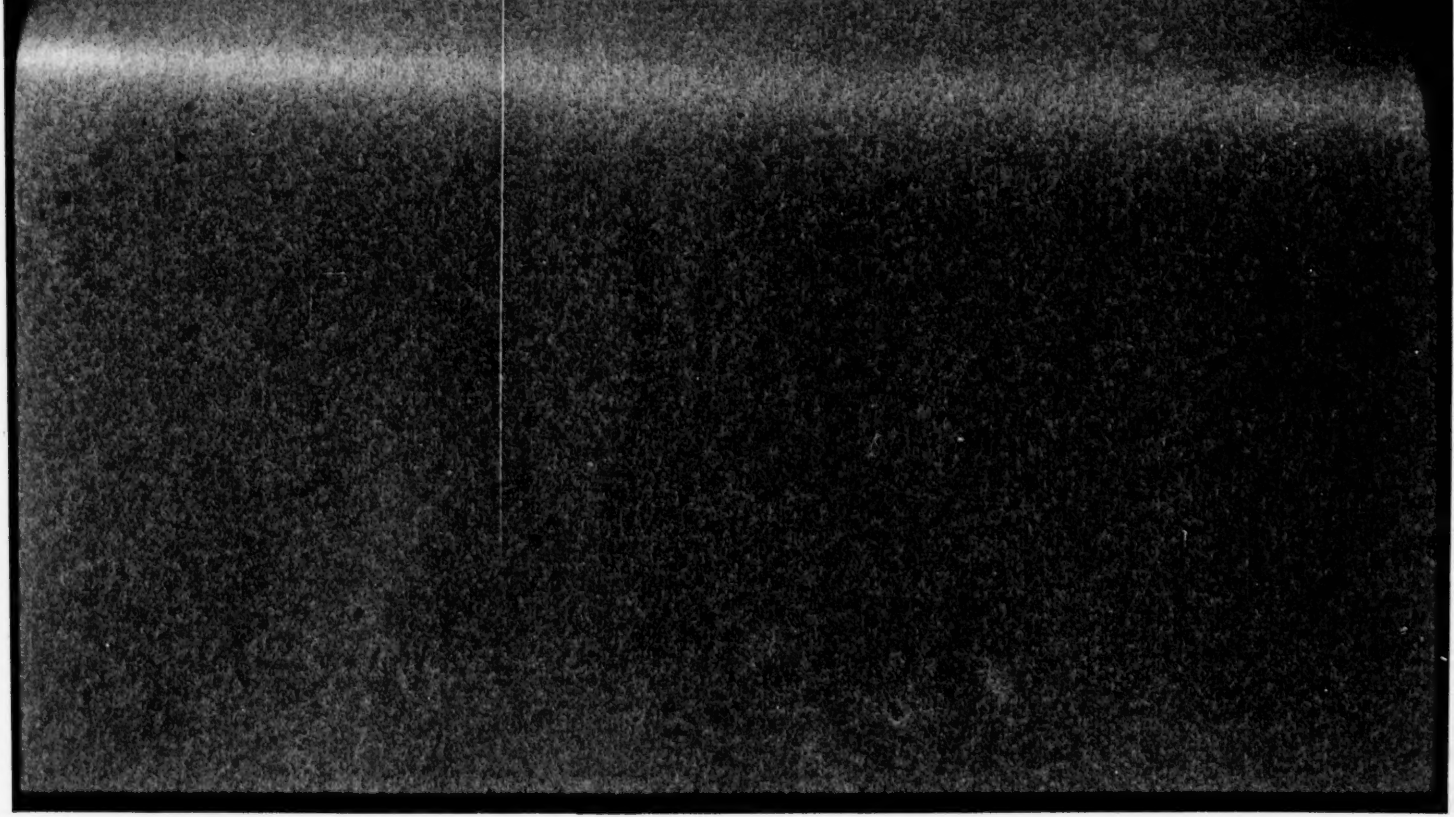
WILLIAM HENKEL, United States marshal for the southern district of New York.

Nos. 387 and 406.

APPEAL FROM THE [illegible] OF THE UNITED STATES FOR THE [illegible] OF NEW YORK.

BRIEF FOR THE APPELLEE ON THE FACTS.

[illegible]
Attorney for Appellee.



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In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES F. W. NEELY, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES marshal for the southern district of New York.

Nos. 387 and 406.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The appellant, Charles F. W. Neely, is admittedly in the custody of the United States marshal for the southern district of New York. He was first arrested on May 5, 1900, on a criminal proceeding, and was, on May 7, 1900, released on bail. The second warrant issued on May 22, 1900, and he was committed under this warrant to the custody of the United States marshal in default of bail.

Subsequently, to wit, on June 27, 1900, application was made to the said circuit court by Ernest W. Baldwin, assistant United States attorney for the southern district of New York, for a warrant to arrest Neely pending extradition proceedings. It charged the said Neely with being a public employee, to wit, the finance agent of the department of posts in the city of Habana, island of Cuba, and with having embezzled, on the 6th day of May, 1900, the public funds of the said island of Cuba to the amount of $10,000 or more, in violation of chapter 10, article 401, of the Penal Code of the said island of Cuba.

It further averred that the said Neely was a fugitive from justice and within the territory of the United States, to wit, in the city of New York, and that Neely had been regularly indicted by the judge of the court of the first instance and instruction of the cathedral district of the said city of Habana for embezzlement of the public funds, and that the judge of said court had ordered his arrest and requested his extradition. The application further set forth that the military governor of Cuba, then the chief executive officer of said island, being Leonard Wood, major-general, United States Volunteers, had, on the 13th day of June, 1900, issued his requisition for Neely's extradition to the President of the United States.

On the same day a similar application was made by the said assistant United States attorney, which only differed from the first application in averring the embezzlement of postage stamps, moneys, funds, and other property belonging to the department of posts in Cuba to the amount of $57,000 in gold, in violation of sections 37 and 55 of the postal code of the said island of

Cuba. Two warrants of arrest were issued in pursuance of these applications, each dated June 27, 1900, and both issued by E. Henry Lacombe, circuit judge of the circuit court for the southern district of New York. The application for the habeas corpus, in section 3, avers that the said Neely "was arrested and taken into custody and brought before the said circuit judge, at the United States courts and post-office building, in said borough, by the said United States marshal under color and by pretense of the authority of the said warrants." These warrants bear the judicial indorsement "Remanded till decision."

The applications for extradition were originally heard on June 29, 1900, before Circuit Judge Lacombe, and at that hearing counsel for Neely moved for a dismissal of the said applications on the ground that the act of Congress of June 6, 1900, was unconstitutional. This motion was denied by Circuit Judge Lacombe on July 18, 1900, in an opinion which affirmed the constitutionality of the act of June 6, 1900, and which, as it has not been printed with the record in the case, is printed as an appendix to this argument, in order that the views of the lower court as to the constitutionality of the law may be known to this court. No final decision was then rendered, but the court, while overruling the objections to the legality of the proceeding, fixed July 23 for the presentation of proofs as to whether there was probable cause for believing that the said Neely had violated the laws of Cuba in the manner set forth in the applications for the extradition.

On July 23, 1900, and July 24, 1900, proofs were offered in support of the allegations of the petition, and under the penal code of the State of New York, which prevailed as a rule of procedure, the opportunity was afforded Neely to offer any evidence in disproof of such allegations. No decision was rendered at that time, but Judge Lacombe indorsed both warrants as follows: "Remanded till decision, July 24, 1900." After a full presentation of the testimony and argument, the circuit court, in an opinion by Judge Lacombe, on August 8, 1900, expressed an opinion upon the facts of the case. He found that "the Government has abundantly shown that there is probable cause to believe that Neely is guilty of the offense of 'embezzlement or criminal malversation of the public funds,' he being at that time a 'public officer' or 'employee' or 'depositary.' Such an offense is obnoxious to the penal code in force in Cuba, article 401 of which provides that 'the public employee who, by reason of his office, has in his charge public funds or property and who should take (or consent that others should take) any part therefrom, shall be punished, etc.'"

The learned judge further found that "The evidence shows probable cause to believe that the prisoner is guilty of an offense defined in the act of June 6, 1900, and which is also a violation of the criminal laws in force in Cuba, and upon such evidence he will be held for extradition." Thereupon these applications were made by Neely for a writ of habeas corpus and upon the denial of the writ, these appeals were taken by the petitioner.

ARGUMENT.

I.

Without regard to possible technical objections of which the Government might avail itself, the Government earnestly desires that this court may consider and authoritatively decide the questions involved in these proceedings upon their merits.

While the Government might with reason ask that the two appeals in this case be dismissed for technical reasons, yet there is no disposition on its part to determine a question which affects the liberty of the subject upon narrow or technical grounds.

If there be such technical objections to the relief prayed for, the Government waives them. It takes this course for two reasons. In the first place, the liberty of an American citizen is at stake. If he be unjustly detained by reason of a warrant issued in pursuance of an act of Congress which is a violation of the Constitution, he should be discharged on the merits of his application, and not further vexed with an unlawful imprisonment. Not only is he concerned in this, but the people of the United States are equally interested and concerned that in this or in any matter there shall be no violation of the Constitution of our country, and no nice or technical question should stand in the way of an authoritative decision by this tribunal as to whether the act of Congress already quoted is, as contended by the Government, a just exercise of legislative authority under the Constitution, or, as contended by Neely, a violation of that instrument and a usurpation of a right of legislation which does not exist.

There is another public reason which calls for a final and authoritative decision of this question. The United States made war against the Kingdom of Spain in the discharge of a duty which it conceived it owed to humanity. It expressly disclaimed any selfish purpose in so doing. It took possession of Cuba in the course of the war and, finally, in negotiating a treaty of peace with Spain, it accepted the possession and control of Cuba for the purpose of pacifying it and erecting, in place of the Kingdom of Spain, a stable and responsible government of the Cuban people.

It has been said to be in this matter a trustee, not only for the Cuban people, for whose benefit it at present governs the island until the Cuban people can construct their own government, but Article I of the treaty of Paris provides that "the United States will, so long as the occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property." Our country is therefore a trustee, not only for the Cuban people, but for civilization. Upon it are both the duty and responsibility of providing a just and honest government for the Cuban people, and its position therefore is one peculiarly of trust and honor.

The testimony in this case, as disclosed to the satisfaction of the learned judge who under the act of Congress heard it, shows that Neely, a citizen of our country, and in our employ in Cuba in the department of posts, has violated his trust and embezzled the funds committed to his charge. It is a matter of common knowledge that his alleged defalcation became a scandal which

attracted the attention of the civilized world and gravely compromised the honor and good name of this Government. The public interests, as well as the fair fame of the Republic, imperatively require that the said Neely shall be extradited to Cuba with the least possible delay, in order that he may be tried for the offenses of which he stands indicted. Undue delay in bringing him to justice would further compromise this Government and injure it in the estimation of the Cuban people and of the world at large.

If, therefore, the Government could, upon technical grounds, ask the court to dismiss these appeals, yet such course would only mean prolonged delay and further appeals to this court. A new application signed and sworn to by Neely could readily be made, and if and when the United States attorney discontinues the prior proceedings above referred to, under which Neely was first taken into custody, and the said Neely thus becomes a prisoner of the marshal solely by virtue of the two warrants issued in the extradition proceedings, a new application for a habeas corpus could be made if this court should decline at this time to hear the whole case upon its merits.

It is as much to the prejudice of the Government as to that of Neely that there should be any further delay in this matter. The constitutionality of his extradition must be determined at some time, and the public interests require that it be determined now. It is due to Neely on the one hand, if he can not be extradited, that he be at once relieved from what, in that event, would be an unlawful detention under these extradition warrants. On

the other hand, if he can not be extradited, it is of equal importance to the Government that it proceed forthwith to try him on the criminal charge now pending in the court of New York.

In this connection it may be stated that the Government, in accordance with the elementary principles of constitutional law which have prevailed in our country by virtue of express constitutional provision, and in England for a thousand years as a part of the unwritten constitutional principles of the Anglo-Saxon race, prefers that Neely should be tried at the place where his alleged crime was committed. To try him in New York for acts which were in fact committed in the distant city of Habana would not be in accordance with the great constitutional principles of government which control the administration of justice in both England and America. If, on the other hand, Neely has been arrested under valid warrants, the public interests and the public honor alike imperatively require that he be extradited to the country, where it is charged by indictment duly found in a court of competent jurisdiction that he abused its hospitality, violated its laws, and embezzled its funds.

II.

THE QUESTION AT ISSUE.

The question at issue is the right of the United States as a sovereign nation to extradite or remove one of its citizens to a country which the United States is occupying and controlling, both by virtue of its power to make

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war and its power to make and execute treaties, in order that the said citizen may there be tried in the local courts of that country for a crime of which he stands charged and of which there is probable cause for believing he is guilty.

It is not a question as to the right of any one department of the Government to order such extradition, for in the case at bar the three great departments of the Government have concurred and cooperated in the act of extradition which is now under review.

The United States, acting through its legislative body, the Congress of the United States, has provided that "Whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein * * * and who shall depart or flee, or who has departed or fled, from justice therein to the United States, * * * shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed." Such is, therefore, the will of this nation, expressed through the one department of the Government vested with the power to make laws, and there is no contention that the case at bar is not within the meaning of this act of Congress. On the contrary, the learned counsel for the appellant concedes that the act was passed

for the express and immediate purpose of extraditing his client.

The Executive Department has likewise concurred in this extradition, for the requisition therefor is made by the military governor and civil magistrate of the island of Cuba, who in that capacity represents the President of the United States, both as the Commander in Chief of its armies and Chief Magistrate; and while it is possible that, if an order for extradition were made, the President might ultimately refuse it, yet, so far as the record shows, the Executive Department of the Government has joined in the application for extradition.

The judicial branch of the Government has likewise concurred in the propriety of the extradition and has actively cooperated to effect it. Under the express language of the act, the circuit court of the district in which Neely was found has judicially determined, after a full hearing of the testimony, that the arrest of Neely is not without probable cause, but that the evidence has established that there is probable cause for believing that he has violated the laws in force in Cuba and has fled from justice therein.

The question then arises whether the Supreme Court on a writ of habeas corpus will determine that such arrest and detention are void for want of legal power to make them. To reach this conclusion this court must hold that Congress is without authority to make the law, that the Executive was without authority, in the discharge of international obligations, to ask or demand such surrender, and that the judicial department of the Government was without authority to hear or determine

the case. This court will not do this unless it is clear beyond a reasonable doubt that all three departments of the Government have exceeded their powers. (*Nicol* v. *Ames*, 173 U. S., 509.)

The contention of the appellant in its nakedness, therefore, amounts to this: That if the United States, in bringing a war to a successful conclusion, or in discharging the solemn obligations of a treaty, shall temporarily occupy another country, and if in such country the gravest crimes shall be committed by anyone not in the military service, and such criminal shall flee to this country, it is an inviolable asylum to protect him and his kind, and this notwithstanding the fact that this country in the discharge of its international obligations and express treaty stipulations is under an express obligation to protect life and property in Cuba by the adequate punishment of crimes against either.

The appellant logically contends that if an American citizen should apply the torch of the incendiary to the homes of the Cuban people from one end of the island to the other, and should assassinate Cubans, Americans, and foreigners in said island, and should then flee to the United States, this country, although solemnly pledged to protect life and property in Cuba during the period of its occupation, is such a cripple among nations that it is powerless to deliver such criminal to the local authorities of Cuba to be tried for their offenses against life and property.

The Government contends, on the other hand, that if independent nations, either by virtue of treaty obligations or voluntarily, and in the spirit of comity between friendly States, have surrendered criminals who sought

an asylum within their territory, such right is equally inherent in our nation as a sovereign power. It would not necessarily follow that this right could be exercised by the Executive alone, and it may require the concurrence of the law-making power, which in the first instance determines the will of the nation. But where such law-making power has authorized any act which other sovereign nations, in their friendly intercourse with nations, may of right do, and especially where our solemn treaty stipulations with another power require that we should do that act as a necessary means to protect life and property in another land, the nation acting through its Congress and Executive has, in the language of the great Declaration, "full power" to do an act "which independent States may of right do."

In this connection it should be observed that the plaintiff in error does not question the applicability of the act of June 6, 1900, to the present case, but broadly denies the power of Congress to pass such a law. Upon well-considered principles the judicial department of the Government will never declare an act of Congress invalid unless it clearly and undeniably contradicts some constitutional restriction upon such legislation, or is shown with equal clearness to be beyond the power of Congress to pass. When such want of power is alleged, the judicial department of the Government will be especially averse and reluctant to restrain or impair the powers of the Government, and for these reasons this act of Congress will not be declared invalid, unless it is clear beyond reasonable doubt that Congress was without power to pass it. (*Nicol* v. *Ames*, 173 U. S., 509.)

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III.

OUTLINE OF ARGUMENT.

It may be suggested *in limine* that the authority of the act of June 6, 1900, and of these proceedings thereunder may be justified in two aspects.

It may be regarded as an act of extradition by reason of the inherent right of the United States as a sovereign nation to extradite a fugitive criminal to a foreign country over which we have no jurisdiction, in accordance with the usages of nations.

Or it may be justified as a removal of the appellant from one part of the United States to a territory which is subject to our jurisdiction, and over which we are for the time being exercising full sovereignty.

In the one case, the proceeding is extradition, which implies the surrender by one nation of a fugitive criminal to another country.

In the second aspect of the case the surrender of Neely to the civil courts in Habana is not an act of extradition, but a removal, in analogy to the removal from one judicial district to another, for which Revised Statutes, section 1014, makes provision. While Revised Statutes, section 1014, may not be broad enough to authorize the removal of Neely to Cuba, yet the act of June 6, 1900, specifically extends the right of removal from one part of the United States to any territory, when such territory is "occupied by or under the control of the United States."

The question, therefore, whether this proceeding should be treated as an extradition or a removal necessarily depends upon the political status of Cuba and the relation

which it at present bears to the United States. If, on the one hand, it is a foreign country and we have no power to legislate for its internal affairs, notwithstanding its present occupation by the Army of the United States, then the law of extradition governs the case. But if, on the other hand, Cuba, while not included within the political boundaries of the United States, is yet subject to our jurisdiction, and at present under our control, either under the war-making or treaty-making power, then the act of June 6, 1900, must be regarded as simply an extension to our existing code of criminal procedure, and provides a means whereby a criminal who has fled from the territory of Cuba to the United States may be removed to stand trial at the place where his offense was committed. In this aspect of the case, if Cuba is at present subject to our dominion, and within our jurisdiction, the power to punish by legislation crimes against our laws, and the incidental power to provide the means and procedure for such punishment, including process for the detention and removal of men charged with crimes, would seem too clear for argument. As will be argued hereafter, lands and people may be subject to the jurisdiction of the United States without being a recognized part of the United States. This fact, while seemingly paradoxical, is illustrated in every war, when, at least temporarily, lands captured by our conquering armies, with their inhabitants, become subject to our jurisdiction and dominion. Thus, for example, the city of Santiago, after its surrender to our victorious army, became subject to our jurisdiction and belonged to, although it was not a part of, the United States,

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and over it we exercised, according to the law of nations, and under the power to make war, every essential right of sovereignty. Internationally it was a part of the United States; constitutionally it was not. "This was some time a paradox, but now the time gives it proof." In other words, conquered territory does not become a recognized and permanent part of the United States until the political branch of the Government accepts it as such. Our territorial boundaries do not advance with our successful armies, nor retire before an invading foe. (*Fleming* v. *Page*, 9 How., 603.)

While, therefore, Cuba is not a foreign *state*—for there is no such state recognized by our or any other Government—yet it is "foreign" to us to the extent and in the sense that the island has not been incorporated either by the treaty of Paris or by the legislation of Congress into the Union, either as a State or Territory. But it by no means follows that because it is foreign it is not "land appertaining to the United States" by reason of conquest and treaty stipulation, and subject to our jurisdiction and dominion *pro tempore*.

That land may be subject to the jurisdiction of the United States, and yet not a part of the United States, is shown by the Constitution itself, for the thirteenth amendment provides that "Neither slavery nor involuntary servitude * * * shall exist within the United States *or any place subject to their jurisdiction*." Our jurisdiction on the high seas, in barbarous countries, in consular courts, that exercised upon the decks of our vessels, and in grounds occupied by our legations, are

all familiar instances of extraterritorial jurisdiction, and such jurisdiction has been sustained by this court in the case of *In re Ross* (140 U. S., 453), where this court sustained a sentence of death imposed by an American consular tribunal in Japan. This court affirmed the constitutionality of the acts of Congress (R. S. 4083–4096) providing for extraterritorial rights in Japan, China, and other countries, and the punishment of crimes by American citizens therein, and the trial for such offenses by our consular officers, and it may be observed that the right to establish these consular courts, as our present right to govern Cuba, was attributed by this court to the law of nations and treaty stipulations.

The contention of the appellant, therefore, that the United States cannot govern an island which we occupy under the provisions of a treaty, and for whose government we are responsible, is absolutely without warrant, either in principle or authority, and its adoption by this court would seriously cripple the United States and deprive it of an essential attribute of sovereignty.

It is not important or necessary to decide this nice question as to the political status of Cuba, for Neely's extradition is justified whether Cuba be foreign or domestic territory. We have only sought to suggest to the court that his surrender to the judicial authorities of Cuba can be justified either as an act of extradition under the law of nations or as a removal to a territory subject to our jurisdiction, in which and as to which we have direct and plenary powers of government. The argument, therefore, will naturally divide itself into two propositions:

1. The United States as a sovereign nation has the

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right, acting through its legislative, executive, and judicial departments, to extradite a fugitive criminal, even though he be an American citizen.

2. The United States, having acquired for the time being all rights of sovereignty in Cuba, has the right to proivde for the punishment of crime therein, and the procedure and process therefor, including the right of removal of a person charged with crime to the place where his offense was committed.

PART I.

THE RIGHT TO EXTRADITE.

IV.

(1) The United States as a sovereign nation has the right, acting through its legislative, executive, and judicial departments, to extradite a fugitive criminal, even though he be an American citizen.

In his opinion, Judge Lacombe has placed the contention of the Government upon its best and surest foundation, namely, that it is an inherent attribute of a sovereign nation to deny an asylum to a criminal fleeing from the outraged laws of a friendly nation. Such right is indispensable in the intercourse of friendly powers and is imperatively required by the comity of nations, and the necessity of its exercise will grow greater as civilization advances and the ultimate goal of humanity, namely, "the parliament of man and the federation of the world," comes nearer.

The great unifiers of the human race, steam and electricity, are increasingly binding nations together in a closer unity of interests and contact by bonds of steel and lightning, and while this duty to humanity of assisting in the prevention of wrong and the punishment of crime has always existed and been recognized, yet, in this evening of the nineteenth century, when the inventive genius of

man has put a Puck-girdle around the globe, the right of extradition has become indispensable to the well being of a sovereign State.

The United States lacks no essential attribute of a sovereign power. While, therefore, it has at times been said that the right of extradition is an incident to the treaty-making power, and, while, unquestionably it can be legitimately deduced from such power, yet the right to extradite, as has been well pointed out by Judge Lacombe in his opinion, does not depend exclusively upon the exercise of the treaty-making power, but is also an incident to the right of the Federal Government to conduct all intercourse with foreign nations. (See *United States* v. *Rauscher*, 119 U. S., 414.) The power to make treaties, to appoint ambassadors and consuls, to make war and conclude peace, all indicate that, in the words of the great Declaration, the Federal Government has power "to levy War, conclude Peace, and to do all other Acts and Things which Independent States may of right do."

In support of this contention, counsel for the Government submits three propositions for the consideration of the court:

(*a*) That, under the law of nations, it has been customary and usual from time immemorial for independent nations, either with or without treaty, to surrender fugitive criminals to the country whose laws have been violated.

(*b*) That the political department of the Federal Government, while generally disinclined, *as a matter of public policy*, to surrender a fugitive criminal, especially if he be a citizen, in the absence of a treaty provision, has

exercised this right of surrender in the absence of treaty provisions, and this right has been affirmed and never denied by the courts, where an act of Congress authorizes its exercise.

(*c*) That the question as to whether a fugitive criminal should be surrendered as a matter of public policy is not a judicial question, but is solely and exclusively for the political department of the Government.

V.

THE CUSTOM OF NATIONS.

(*a*) *That, under the law of nations, it has been customary and usual from time immemorial for independent nations, either with or without treaty, to surrender fugitive criminals to the country whose laws have been violated.*

The right and practice of extradition goes back to the remotest ages. The rule of nations before the dawn of the Christian era clearly was that any nation had a right to surrender a fugitive criminal. The earliest extradition treaty on record was concluded by Rameses II, the Pharaoh who "knew not Joseph," and Khitasar, King of the Khita over thirteen centuries before the Christian era. It provided for a strict return of fugitives from both countries. (Burgsch, "Egypt and the Pyramids," II, 71–76.) It is true that under the Jewish law cities of refuge were made as sanctuaries of crime, but their very existence implied that in all other places criminals were denied the right of asylum. Similarly in the times

of the Roman Republic certain allied cities were specified as inviolable places of refuge for fleeing criminals, especially those who had gone into voluntary exile for political reasons. But the very existence of these places carried with it a corresponding exclusion of all other places as an asylum for crime. When these cities were merged into the Roman Empire, they lost their character as a refuge for fleeing criminals.

History has preserved some instances of extradition from oblivion. Thus, at the end of the war with Antiochus, King of Syria, the Romans stipulated by treaty for the surrender of Hannibal, who, however, escaped. He was afterwards demanded of the King of Bithynia and the demand conceded. The Roman law expressly provided for the surrender to a foreign nation of any Roman citizen who offered violence to foreign ambassadors on Roman territory, and instances of an exercise of this right are recorded in Rein. Criminalrecht der Roemer. Prior to the modern era there was comparatively little occasion for extradition, for without the locomotive or the steamship and in days when all transportation was attended with difficulty criminals had few means of escape. The necessity, however, for extradition was early recognized by the leading states of the world.

Thus, by a treaty concluded as early as 1174 between Henry II of England and William of Scotland, it was agreed that if any persons guilty of felony in England should fly into Scotland they should be immediately seized and either tried in the courts of the King of Scotland or delivered up to the Justices of England, and vice

versa. (Ward's History of the Law of Nations, vol. 2, 319.) England and France concluded a treaty as early as 1303 by which a similar agreement to refuse protection to the enemies of either was given. In 1378 the Duke of Savoy and Charles V of France agreed by treaty that all malefactors who had fled from Savoy to Dauphiny or from Dauphiny to Savoy should be delivered up, even if they were subjects of the State surrendering them. (Isanbert, Collection des Lois, vol. 5, p. 479.)

The *Intercursus Magnus* concluded between Henry VII and the Flemings in 1497 provided, as stated by Lord Bacon in his "History of Henry VII," an express article against the reception of the rebels of either prince by other. On February 23, 1661, England concluded a treaty with Denmark by which the latter agreed to deliver up on requisition the regicides who had been concerned in the murder of Charles I. The States-General of Holland surrendered some of the regicides without any treaty, and in 1662 executed a general treaty of extradition for stipulated offenses with England. There are also repeated instances of surrender of fugitive criminals in the absence of treaty stipulation—the delivery up of Count de St. Pol to Louis XI, the surrender of the Earl of Suffolk by the King of Spain to Henry VII, and the promise of Elizabeth to deliver Bothwell to the Scots; while, on the other hand, there are instances where such demands of surrender have been refused, as, for example, the refusal of France to deliver up Cardinal Pole to Henry VIII.

VI.

THE LAW AS STATED BY RECOGNIZED AUTHORITIES.

More light is thrown upon the question as to the status of extradition in international law by reference to the great authorities upon that branch of the law, for, as was well said by Mr. Justice Gray in the case of *The Paquete Habana*, 175 U. S., 677, resort must be had "to the customs and usages of civilized nations; and as evidence of this, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

Commencing with the great fountain head of knowledge on this subject, Grotius, we find the following statement:

> This right [to punish criminals] is not to be impeded by the State in which the offender lives, or its rulers. But as States are not accustomed to permit another State to enter their territory armed for the sake of executing punishment, nor is that expedient, it follows that the city where he abides who is found to have committed the offense ought to do one of two things—either itself, being called upon, it should punish the guilty man, or it should leave him to be dealt with by the party which makes the demand; for this is what is meant by giving up, so often spoken of in history. * * * All which passages, however, are to be understood, that the people or king are not strictly bound to give up the

> person, but, as we have said, to punish him. * * * It is a disjunctive obligation. (Book 2, chap. 21, secs. 3 and 4.)

Vattel affirms the same obligation either to punish or surrender in the following words:

> This is pretty generally observed with respect to great crimes, which are equally contrary to the laws and safety of all nations. Assassins, incendiaries, and robbers are seized everywhere, at the desire of the sovereign in whose territories the crime was committed, and are delivered up to his justice. The matter is carried still further in States that are more closely connected by friendship and good neighborhood. Even in cases of ordinary transgressions, which are only subjects of civil prosecution, either with a view to the recovery of damages, or the infliction of a slight civil punishment, the subjects of two neighboring States are reciprocally obliged to appear before the magistrate of the place where they are accused of having failed in their duty. Upon a requisition of that magistrate, called "letters rogatory," they are summoned in due form by their own magistrates, and obliged to appear. An admirable institution, by means of which many neighboring States live together in peace, and seem to form only one republic. (Book II, sec. 76.)

Puffendorf has been cited by Story in his Conflict of Laws, page 879, as disaffirming this obligation to surrender, but, as has been pointed out by Clark in his admirable Treatise on the Law of Extradition, page 4, this is an error. He regarded as an open question whether the refusal to surrender was a just cause for war, but this is very different from denying the obligation to surrender. He, however, says, in one of his least-known works,

"That a sovereign State is presumed to have power over its subjects, and that knowingly suffering them to commit crimes it shares their guilt." He adds "that the liability to war which a State incurs when it receives and protects fugitive criminals arises rather from special compact than from any general obligation." (Lib. 2, chap. 16.) This, however, does not deny the duty of surrender as an obligation, but simply affirms that failure to discharge the duty does not rise to the dignity of a *casus belli* in the absence of a treaty stipulation.

Burlamaqui in his Principes du Droit de la Nature et des Gens calls the right of surrender "une obligation commune et indispensable."

The two great jurists of America have this to say on this subject:

Story, in his work on the Constitution, section 1803, says:

> However the point may be as to foreign nations, it can not be questioned that it is of vital importance to the public administration of criminal justice, and the security of the respective States, that criminals who have committed crimes therein should not find an asylum in other States, but should be surrendered up for trial and punishment. It is a power most salutary in its general operation, by discouraging crime, and cutting off the chances of escape from punishment. It will promote harmony and good feelings among the States, and it will increase the general sense of the blessings of the National Government. It will, moreover, give strength to the great moral duty which neighboring States especially owe to each other, by elevating the policy of the mutual suppression of crime into a

legal obligation. Hitherto it has proved as useful in practice as it is unexceptionable in its character.

Kent, in his Commentaries, page 40, says as follows:

> The language of these authorities is clear and explicit, and the law and usage of nations as declared by them rests upon the plainest principles of justice. It is the duty of the Government to surrender up fugitives upon demand, after the civil magistrate shall have ascertained the existence of reasonable ground for the charge, and sufficient to put the accused upon his trial. The guilty party can not be tried and punished by any other jurisdiction than the one whose laws have been violated, and therefore the duty of surrendering him applies as well to the case of the subject of the State surrendering as to the case of a subject of the power demanding the fugitives.

And it will be seen hereafter that Kent, as a judge, adhered to the position which he had taken as a commentator.

It is true that to enforce this general and, as some writers have called it, this "imperfect" obligation, treaties are often made, and it has been claimed that the making of a treaty excludes the theory of any obligation independent of the treaty. Mr. Clark, in the treatise already referred to, page 11, disposes of this argument effectively in the following sentence:

> This clearly is a *non sequitur;* a treaty may often be necessary to regulate and limit the performance of a duty of undisputed obligation; and that the granting of extradition is, if not scientifically speaking a matter of perfect obligation, at least a duty of public morality, has not been denied by any writer worth notice.

It is not necessary, however, to enter upon the nice distinctions as to whether the obligation is perfect or imperfect. While this subject has been the fruitful cause of controversy, yet there has been no real dispute as to the moral or ethical obligation of a State to surrender a fugitive criminal, unless such surrender in some way conflicts with its policy or sense of justice; and it is equally clear that, acting upon this discretion, sovereign nations from time immemorial have, for reasons which commended themselves, surrendered or refused to surrender fugitive criminals. Independent of treaty stipulation, the matter is purely one of comity, but this does not make the right to surrender from considerations of comity less important to the well-being of a State.

VII.

GOVERNMENT'S EXERCISE OF RIGHT.

(*b*) *That the political department of the Federal Government, while generally disinclined, as a matter of public policy, to surrender a fugitive criminal, especially if he be a citizen, in the absence of a treaty provision, has exercised this right of surrender in the absence of treaty provisions, and this right has been affirmed and never denied by the courts, where an act of Congress authorized its exercise.*

The question of extradition is not a new one in this country. On the contrary, by reason of our peculiar institutions, no country has had greater experience with reference to it. This has given to our judges and statesmen exceptional opportunities for placing the true

grounds for the exercise of the right on a broad and just basis. To quote the very graceful compliment of Mr. Edward Clark, of the English bar, in the work referred to, "The American judicial bench has been adorned by men who added the lawyer's knowledge to the statesman's thought, and who, bringing both to bear on the questions of public law, have left us works of enduring value."

Prior to the Revolution, when the colonies occupied, as against each other, the relation of foreign States, a criminal who committed a crime in one of these colonies and fled to another was arrested wherever found and sent for trial to the place where the offense was committed. (See *Case of Short*, 10 Serg. and Rawl., 129.) The Constitution, while leaving the whole matter of international extradition to the discretion of the Federal Government, provided that, as between the States, "a person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime."

While this constitutional provision has no application to international extradition, it yet shows the spirit of our law, which is to punish rather than to shield the criminal. Time was when, because of the rigor of the law, the function of government seemed to be to protect the guilty and innocent alike, but this time is happily past.

After the revolution, the first case in which the question of extradition arose was that of Chevalier de Longchamps, in 1784. The chevalier had been indicted before the court of oyer and terminer at Philadelphia for

threatening bodily harm to the consul-general of France, and also for assault. He appeared to be an officer of the French army, and the French Government made demand upon President Washington for his surrender for punishment, after he had been adjudged guilty in the courts of Pennsylvania. Sentence was postponed pending an examination of the question as to the right of the King of France to demand his surrender. There was no treaty between the United States and France on the subject of extradition. The Pennsylvania court held that no obligation to surrender existed in that case, and added:

> We think cases may occur, where council [then the supreme executive body of the State of Pennsylvania] should *pro bono publico*, and to prevent atrocious offenders evading punishment, deliver them up to the justice of the country to which they belong, or where the offenses were committed.

As the crime was committed on American soil, surrender in this case was refused, especially as our law had passed upon his offense and had a prior right to satisfy its sense of justice. It will be noted, however, that the court recognized the right of a nation to surrender in its discretion an offender, and while the idea that a State of the Federal Union has any control of the matter has long since been exploded, yet, substituting "the Federal Government" for the word "council," the court affirmed the right of the American Government to extradite if the public interests required it, even though there were no treaty.

In 1791 the Governor of South Carolina requested the President to demand of the Governor of Florida the

surrender of certain fugitives who had committed crimes in South Carolina. Florida was then a foreign State. The matter was referred to Thomas Jefferson as Secretary of State. He decided that "the laws of the United States, like those of England, receive every fugitive, and no authority has been given to our *executives* to deliver them up. If, then, the United States could not deliver up to General Quesnada (governor of Florida) fugitives from the laws of his country, we can not claim *as a right* the delivery of fugitives from us."

It will be noted that Mr. Jefferson only affirms that the *executive* branch of the Government has no right independent of treaty or act of Congress, of its own motion, to surrender a fugitive, and also that we have no right to *demand* such surrender to us. Nowhere, however, does he say that this Government, acting through its Congress and Executive, could not, as an incident of sovereignty, extradite, or that Florida could not surrender to us a fugitive.

In 1794 Jay's treaty was concluded between the United States and Great Britain, which incidentally provided for a reciprocal right of extradition. The Federal Government was first called to pass upon the question of the right to extradite independent of treaty in January, 1797, when the Kingdom of Spain demanded the surrender of one Jones, a criminal who had fled from Florida. Attorney-General Lee gave to the Secretary of State on official opinion on January 26, 1797, as follows:

> If a demand were formally made that William Jones, a subject and fugitive from justice, or any of

> our own citizens, heinous offenders within the dominion of Spain, should be delivered to their Government for trial and punishment, the United States are in duty bound to comply; yet, having omitted to make a law directing the mode of proceeding, I know not how, according to the present system, a delivery of such offender could be effected. To refuse or neglect to comply with such a demand, may, under certain circumstances, afford to the foreign nation just cause for war; who may not be satisfied with the excuse that we are not able to take and deliver up the offenders to them. This defect appears to me to require a particular law. (Opinions of the Attorneys-General, Vol. I, pp. 69 and 70.)

It will be noted that this opinion clearly recognized the obligation of the Government in its international obligations to surrender a fugitive criminal upon just cause, but claims that the Executive is paralyzed for want of an act of Congress providing the necessary means. Evidently no doubt existed in the Attorney-General's mind as to the right of Congress to provide such means, and in the case at bar the difficulty which arose in the Jones case does not exist, inasmuch as the act of June 6, 1900, empowers and authorizes Neely's extradition. The first formal deliverance by an American statesman, therefore, under the Federal Constitution distinctly affirmed the right of extradition independent of treaty stipulation, but only suggested that an act of Congress was necessary to enable the Executive to discharge this plain duty.

The famous case of Jonathan Robbins, which arose under the administration of John Adams, and played no inconsiderable part in the politics of that period, is of little

value for the purposes of the present case, as the extradition was there directed by the President in pursuance of the treaty stipulation in Jay's treaty. It is chiefly interesting because of the remarkable argument of John Marshall in the House of Representatives, whereby he vindicated the right of the Executive to carry out a treaty stipulation, even though Congress had not passed a law to give effect to it.

In 1819 the celebrated case of *Daniel Washburn* (4 John. Chan. Rep., 106) was heard and determined. Washburn had been brought before the court on a habeas corpus to determine the validity of his detention under a warrant of arrest to extradite him to Canada, where, it was alleged, he had feloniously stolen some money. The prisoner was discharged for lack of adequate proof that he had committed the offense, but the right to extradite was broadly affirmed by Chancellor Kent, who said:

> It is the law and usage of nations, resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony and other high crimes, and fleeing from the country in which the crime was committed, into a foreign and friendly jurisdiction. When a case of that kind occurs, it becomes the duty of the civil magistrate, on due proof of the fact, to commit the fugitive, to the end that a reasonable time may be afforded for the Government here to deliver him up, or for the foreign government to make the requisite application to the proper authorities here, for his surrender. Who are the *proper authorities* in this case, whether it be the executive of the State, or, as the rule is international, the executive authority of the *United States*,

> the only regular organ of communication with foreign powers, it is not now the occasion to discuss. It is sufficient to observe, that if no such application be made, and duly recognized, within a reasonable time, the prisoner will then be entitled to his discharge upon *habeas corpus*. If the judicial authority has afforded sufficient means and opportunity for the exercise of this act of commutative justice, it has done its duty. Whether such offender be a subject of the foreign government, or a citizen of this country, would make no difference in the application of the principle; though, if the prisoner, as in this case, be a subject of the foreign country, the interference might meet with less repugnance.

The great chancellor abundantly fortifies his proposition as to the duty to extradite independent of treaty, not merely by references to the great writers on international law, but also by the citation of numerous cases in the English courts in which this view was taken. He affirms the proposition that an extradition treaty "only operates as a recognition, not a creation, of right." At the time this decision was rendered there was no extradition treaty, and this doctrine was therefore not *obiter dictum*.

A few years later, in August, 1823, the case of Edward Short was tried before the supreme court of Pennsylvania. (See *Commonwealth*, at the instance of *Short* v. *Deacon*, 10 Serg. & Rawl., 125.) Short was charged with having committed murder in Ireland and was arrested in Pennsylvania at the suit of a private person without the intervention of either Great Britain or the United States. The legality of his commitment was necessarily at issue.

Chief Justice Tilghman delivered the opinion of the court, and he so far modified the decision of Chancellor Kent as to say that no State had an absolute and perfect right to demand of another the delivery of a fugitive criminal, although it had what is called an "imperfect right;" that is, a right to ask it as a matter of courtesy, good will, and mutual convenience. This, of course, necessarily implied that the nation upon which the demand was made had a right of surrender, if it saw fit to exercise such courtesy and good will. The learned Pennsylvania chief justice then proceeded to decide that the delivery of a fugitive was the affair of the Executive Government, to which the demand of the foreign power must be addressed, and that the judiciary had no independent right of surrender. He affirmed the proposition that every nation had an undoubted right to surrender fugitives, but left undecided the question previously raised by Attorney-General Lee as to whether the President could discharge this duty unless empowered to do so by a law of Congress.

This authority, therefore, while contradicting the authority of Kent on the abstract proposition as to a binding *obligation* to surrender in the absence of treaty stipulations, yet agrees with Kent as to the only question which is pertinent to the case at bar, namely, that there was a power in our country, as in every sovereign nation, to surrender, although its exercise might require an act of Congress to provide the necessary means. While the prisoner was discharged, it was clearly on the ground that there was no case for international extradition at

all, as Short had been arrested at the suit of a private individual, and neither nation had taken any special action in the matter.

In 1832 the case of John L. Clark (9 Wendell, 212) was argued in the supreme court of New York, and, while the case is not in point on its facts, being a case of interstate rendition, yet it is interesting because Chief Justice Savage gave the weight of his testimony as to the duty of extradition. He said:

> Civilized nations have seen the necessity and propriety of surrendering fugitives from justice, that they may be tried by the laws of the country in which the offense was committed. This matter has usually been arranged by treaty; but where no treaty exists, the comity of nations requires that offenders against the laws of one nation shall not find a sanctuary in another.

The executive department of the Government has had the question of extradition under discussion on numerous occasions, and the various official communications with reference to such applications will be found in 1 Moore on Extradition, page 21, note 1. The various Secretaries of State and Attorneys-General who have passed upon the question officially have differed widely with respect to the abstract obligation to extradite in the absence either of a treaty or an act of Congress authorizing such extradition; but they have, with few exceptions, agreed that, *as a matter of public policy*, it would be politically inexpedient for the executive branch of the Government to surrender a fugitive criminal unless it was authorized to do so either by an act of Congress or a treaty stipula-

tion. In effect, they decline to take the exclusive responsibility, and as a principle of public policy this rule of action needs no vindication.

Mr. John Bassett Moore, in his exhaustive work on extradition, Vol. I, p. 21, sec. 16, summarizes these official decisions of the executive department of the Government by saying that "In the United States the general opinion has been, and practice has been in accordance with it, that in the absence of a conventional *or* legislative provision there is no authority vested in any department of the Government to seize a fugitive criminal and surrender him to a foreign power."

While this fairly states the doctrine of American publicists on this question, yet even such conclusion has not been by any means uniform. On the contrary, as is well-known, Secretary Seward asserted the right of the executive department, in the absence of a treaty or an act of Congress, to extradite a fugitive criminal, in what is known as the Arguelles case. This case is more particularly referred to in Appendix.

In the case at bar there is no necessity to contend, and no such suggestion is made, that the President, in the absence of either an act of Congress or a treaty stipulation, can extradite a fugitive criminal, especially if he be an American citizen. While Secretary Seward's opinion that he could, subject of course to the power of the judiciary to determine whether there is probable cause for the extradition, yet the case at bar does not require the application of that principle.

VIII.

DECISIONS OF SUPREME COURT AS TO RIGHT TO EXTRADITE INDEPENDENT OF TREATY.

The present accepted opinion is clearly stated by Mr. Justice Miller in the case of *U. S.* v. *Rauscher* (119 U. S., 408–411):

> It is only in modern times that the nations of the earth have imposed upon themselves the *obligation* of delivering up these fugitives from justice to the States where their crimes were committed, for trial and punishment. This has been done *generally* by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that there was no well-defined *obligation* on one country to deliver up such fugitives to another, *and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked;* and it has never been recognized as among those obligations of one government toward another which rest upon established principles of international law.

That the right of extradition and the duty to extradite may be properly exercised independently of a treaty, and that, therefore, a treaty does not narrow or restrict the right of a foreign nation to extradite, if its interests require such action, is shown in the case of *Ker* v. *The State of Illinois* (119 U. S., 436). In this case the defendant Ker was on trial in the criminal courts of the State of Illinois for larceny. He presented a plea in abatement which averred that he had been kidnaped in the city of

Lima, in Peru, and brought to this country for the purpose of subjecting him to this trial, and that such forcible kidnaping was in violation of an extradition treaty which existed between Peru and the United States, and which provided the only method of extraditing a fugitive criminal from one country to the other. It was further contended on his behalf that any extradition independent of the treaty was in violation of it, and therefore void. The Supreme Court, however, denied this proposition, and in its opinion, by Mr. Justice Miller, said:

> There is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. It will not be for a moment contended that the Government of Peru could not have ordered Ker out of the country on his arrival, or at any period of his residence there. If this could be done, what becomes of his right of asylum?
>
> Nor can it be doubted that the Government of Peru could of its own accord, without any demand from the United States, have surrendered Ker to an agent of the State of Illinois, and that such surrender would have been valid within the dominions of Peru. It is idle, therefore, to claim that, either by express terms or by implication, there is given to a fugitive from justice in one of these countries any right to remain and reside in the other; and if the right of asylum means anything, it must mean this. The right of the Government of Peru voluntarily

> to give a party in Ker's condition an asylum in that country, is quite a different thing from the right in him to demand and insist upon security in such an asylum. The treaty, so far as it regulates the right of asylum at all, is intended to limit this right in the case of one who is proved to be a criminal fleeing from justice, so that, on proper demand and proceedings had therein, the government of the country of the asylum shall deliver him up to the country where the crime was committed. And to this extent, and to this alone, the treaty does regulate or impose a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom.

In other words, the court ruled that the purpose of an extradition treaty was not to confer a right of asylum in all cases outside of the treaty, but to compel and provide a specific method for the extradition of prisoners in the class of cases mentioned in the treaty. An extradition treaty, while declaring the general moral obligation of a friendly nation to extradite a fugitive criminal when its own public interests do not forbid such action, deprives such nation of any discretion, and compels it, without reference to its peculiar interests, to surrender in consideration of a reciprocal surrender by the demanding nation in like cases.

To prevent any misapprehension, we beg to insist, as at the beginning of this brief, that our proposition is that when an act of Congress authorizes such extradition, and the nation has thus spoken through the organ of its will, the legislative body, that a fugitive criminal can be extradited in pursuance of such direct mandate of Con-

gress. This must be so, not only because of the obligation which the nation in its sovereign capacity owes to friendly nations not to give an asylum to criminals, but also because this nation "possesses the undoubted right to determine who shall compose its members," and the corresponding "right to expel from its territory persons who are dangerous to the peace of the state." That this inherent right exists has been established by this court in the case of *Fong Yue Ting* v. *United States* (149 U. S., 698), which throws a strong side light upon the discussion of the present question by showing that the right of the Federal Government, by virtue of its inherent sovereignty, to expel such as are deemed, by reason of race, physical condition, or want of moral character, to be unworthy of fellowship in our society, exists independent of treaty or of the implied powers thereby granted; that, in other words, this, as every Government, "possesses the undoubted right to determine who shall compose its members" and "the control of the people within its limits and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested."

In this case petitions for *habeas corpus* were granted on the application of three Chinese laborers who had been arrested and held by the marshal for deportation, under the provisions of an act of Congress excluding Chinese immigrants. It was alleged that this act of Congress violated the express provisions of a treaty, and that therefore the act of Congress was void. This court

held that the power to exclude or expel aliens is vested in the political department of the National Government, and is to be regulated by treaty *or* by act of Congress and to be executed by the Executive according to the regulations so established; that the power of Congress to expel, like the power to exclude, aliens may be exercised entirely through executive officers, and that the act of Congress is valid even though in contravention of stipulations of a prior treaty. This necessarily implies that there is this power to expel by act of Congress independent of the treaty-making power. The opinion, by Mr. Justice Gray, cites with approval the prior decisions of this court in *Nishimura* v. *United States* (142 U. S., 651–659), *Chae Chan Ping* v. *United States* (130 U. S., 581), and *Knox* v. *Lee* (12 Wall., 457), in all of which it was held that the right of expulsion was an incident to sovereignty and did not depend exclusively on the treaty-making power.

It is true that in the Fong Yue Ting case the right to deport was recognized in the case of foreigners, and there may be a distinction between the right of a foreigner to come here and the right of a citizen of the United States to return here after he has visited another country and violated its laws. The former had no rights as a citizen; the other had acquired rights. But a citizen may forfeit his right by becoming an enemy of the state through the commission of crime. Daily in our courts we restrain a man of his liberty, sometimes for life, and frequently strip him of citizenship as a penalty for violating our laws. Indeed, for exceptional crimes, we take not merely

his liberty and citizenship, but his life as well, even though he be an American citizen. If, therefore, the Government has this right, it has an equal right, in accordance with the usages of nations, to compel a citizen to go to another country to stand trial for an offense when there is probable cause for believing that he has violated and abused the hospitality of that country by the violation of its laws.

The right to deport for these purposes is surely no greater infraction of personal liberty than the right to punish crime in our country. In each case the justification is the well-being of the state, and the greater cause of justice to which all nations are dedicated, and to promote which they are formed. For this reason the right of a sovereign nation to extradite has never been regarded by any nation as affected by the question of the citizenship of the offender, although such citizenship may, as a matter of public policy, affect the exercise of the right. The political department of a government will be less disposed to extradite one of its own citizens, but its right to do so is equally good, whether the fugitive criminal be a citizen or a foreigner. The Fong Yue Ting case, therefore, is not inapplicable because Fong Yue Ting was a foreigner, for the reason that in that case the right to deport was not placed upon the commission of a crime by Fong Yue Ting, but was simply in the exercise of the right of a sovereign state to determine "who shall compose its members."

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IX.

POLICY OF EXTRADITION FOR EXECUTIVE AND CONGRESS.

(*c*) *That the question as to whether a fugitive criminal should be surrendered as a matter of public policy is not a judicial question, but is solely and exclusively for the political department of the Government.*

We apprehend that upon this proposition there can and will be no serious dispute. Assuming that there is a constitutional power to extradite, either in the Executive alone or in the Executive and Congress, it can not be doubted that the propriety of its exercise is purely for the political branch of the Government, and that the court could not judicially determine that the extradition of Neely was unnecessary. The judicial branch of the Government is called upon to determine, under the act of Congress, whether there is probable cause, but it acts as an auxiliary to the political branch of the Government in this respect. This ancillary function of the courts is illustrated and vindicated in the case of *Fong Yue Ting* v. *United States* (*supra*), and only a reference to it is now necessary.

If it be within the power of the Government to compel a foreigner or citizen to answer a charge in the courts of a friendly country, and such power can not be seriously questioned, then, to quote the famous doctrine of Chief Justice Marshall in *McCulloch* v. *Maryland* (4 Wheat., 316):

> The sound construction of the Constitution must allow to the national legislature that discretion, with

respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

X.

CHIEF FALLACY OF APPELLANT'S ARGUMENT.

Before passing to the second branch of our argument, we wish to call attention to the fallacy which runs through the appellant's brief, which is that an extradition statute is an attempt to legislate for a foreign country. His contention is that the act of June 6, 1900, is unconstitutional because it attempts to legislate for the island of Cuba, which is claimed to be the territory of a friendly power. If this were so, every extradition statute would of necessity be unconstitutional, for all such statutes have reference to the extradition of men to other countries than our own. The fallacy of the argument is shown by the fact that such statutes operate here and not in foreign countries. The fugitive is found here, is arrested here, the case is heard here, and he is surrendered here to the representative of such foreign country. The act of June 6, 1900, does not differ in this respect from the previous extradition statutes. It operates in this country and is designed to detain the fugitive pending a hearing, to give him a hearing before the courts of our country in order to ascertain whether there be probable

cause for the surrender, and to commit him until the Secretary of State shall authorize his surrender. The suggestion that this is an attempt to legislate for a foreign country is certainly novel, but without reason or authority to support it.

The appellant seeks to avoid the force of this suggestion by arguing that the act of June 6, 1900, is unconstitutional because it contemplates an extradition to Cuba, where, as he contends, the President, as Commander in Chief, has, since the treaty of Paris, maintained a government in excess of his power and in defiance of the Constitution. He does not question that the government there maintained is the *de facto* and only government, and we might argue that the right to extradite to a *de facto* government in a foreign country is not affected by any consideration of its lawfulness. If, for example, we extradite a fugitive to France, the court does not stop to inquire whether the legitimate government in France is the kingdom of the Orleanist, the empire of the Bonapartist, or the Republic. It is enough that there is a *de facto* government administering criminal laws. If any question as to its legitimacy becomes important, such question is exclusively for the Executive.

Assuming, however, that we are wrong in this contention, it remains for us to pass to the second part of this argument, which seeks to demonstrate our right to govern Cuba in accordance with the law of belligerent right and the right of Congress to enact legislation to aid the Commander-in-Chief in maintaining such government.

PART II.

THE RIGHT OF THE UNITED STATES TO GOVERN CUBA.

Hitherto counsel for the Government have endeavored to sustain the constitutionality of the act of June 6, 1900, and the extradition of Neely thereunder by reference to the law of extradition and the right of the Government which it has always claimed and exercised to extradite fugitive criminals. Counsel now proposes to justify this legislation and the removal of Neely to Cuba upon broader grounds, namely, the right of this Government as a sovereign power to govern Cuba as conquered territory which by virtue of the war-making and treaty-making powers it is lawfully occupying.

In this connection we submit three propositions:

(1) The United States is at the present time, under the law of belligerent occupation, the *de facto* and *de jure* sovereign in the island of Cuba, and as such is possessed of all essential attributes of sovereignty, and such sovereignty is not affected by the fact that its duration may be limited in time or exercised for a specific object.

(2) Exercising such sovereignty, the United States has the power, and it is its duty, under the treaty of Paris, to enact such legislation as will aid the President to protect life and property in Cuba.

(3) That such sovereignty is a political and not a judicial question, and its exercise by the political department of the Government conclusively binds the judges as well as all other officers, citizens, and subjects of that Government.

XI.

The United States is at the present time, under the law of belligerent occupation, the de facto and de jure sovereign in the island of Cuba, and as such is possessed of all essential attributes of sovereignty, and such sovereignty is not affected by the fact that its duration may be limited in time or exercised for a specific object.

In discussing the first of these propositions we reach the substantial objection which the appellant urges against the constitutionality of the act, for his contention is, in substance, that as Congress has recognized that the people of Cuba are free and independent, and as the war with Spain has terminated by a treaty of peace, the continued occupation by our Government of such island is unconstitutional. To quote his language—and to indicate to this court the serious nature of his objection—he says (paragraph 23 of his petition):

> That there is no authority in the Constitution of the United States for the occupation or control by the United States of the territory of a friendly foreign nation or for the government of such foreign territory by the United States by martial law or otherwise in time of peace, and that the form of government now maintained by the United States in Cuba is wholly illegal and without authority under the Constitution of the United States.

In deciding this question this court is not bound by the averments of the petition for the writ of *habeas corpus*. The mere assertion by Neely that the present government of the island of Cuba is a usurpation is not conclusive upon this court, which can and is bound to take judicial cognizance of the historic facts in the matter.

This was clearly held to be the law in the case of *Jones* v. *United States* (137 U. S., 202), in which the vital question was whether this Government had any lawful jurisdiction over the island of Navassa in the Caribbean Sea. In delivering the opinion of the court Mr. Justice Gray said (p. 214):

> All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence nor in accord with the pleadings. *United States* v. *Reynes*, 9 How., 127; *Kennett* v. *Chambers*, 14 How., 38; *Hoyt* v. *Russell*, 117 U. S., 401, 404; *Coffee* v. *Grover*, 123 U. S., 1; *State* v. *Dunwell*, 3 R. I., 127; *State* v. *Wagner*, 61 Maine, 178; *Taylor* v. *Barclay* (2 Sim., 213) and *Emperor of Austria* v. *Day* (3 De G., F. and J., 217, 221, 233), above cited; 1 Greenl. Ev., § 6.

XII.

THE MEANING OF A SOVEREIGN STATE.

Before passing to such sources of information it may be well to define clearly the expression "sovereign State." Halleck in his work on international law, edited by Sir

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Sherston Baker, ed. 1893, Vol. I, p. 66, defines a sovereign State as "any nation or people organized into a body politic and exercising the rights of self-government." He adds: "A State is distinguishable from a nation or a people, since the former may be composed of different races of men, all subject to the same supreme authority." Thus the Jewish people, the Polish nation, the race of Gypsies, are none of them sovereign States.

"The marks of an independent State are that the community constituting it is permanently established for a political end, that it possesses a definite territory, and that it is independent of external control." (Halleck's Int. Law, p. 18.)

"The sovereignty of a State is its inherent right to exercise jurisdiction over all questions arising within its territorial limits, and to control and regulate the actions and relations of all its citizens or subjects." (Davis's Outlines of International Law, p. 28.)

Sovereignty is not a name or an assertion, but a fact. It means "the possession or exercise of supreme authority." This, as has been stated, is a question of fact, and the fact can not be affected by mere words.

> No doubt one state may place itself under the protection of another without losing its international existence as a sovereign state, if it retains its capacity to treat, to contract alliances, to make peace and war, and to exercise the essential rights of sovereignty. But these rights must be retained *de facto* as well as *de jure*, for although a state may retain the forms of independence, if it be practically

> and notoriously governed by officers appointed by another state, and incapable of exercising its own volition, it will be regarded as a mere dependence of the governing power. (1 Halleck's International Law, 3d ed., p. 69.)

Measured by this standard, it would seem to be perfectly obvious in the first place that the inhabitants of Cuba, while a people, and possibly forming a nation, do not at the present time maintain of themselves a sovereign State, and as a matter of fact, do not exercise any sovereign powers of their own volition; and in the second place that the United States, acting through the Commander in Chief, has at the present time, as the appellant himself avers in his petition, "all executive, legislative, and judicial power over the affairs of the island of Cuba and over the Cuban people," and is thus the sovereign power in Cuba for the time being. Admittedly, it is the *de facto* government. By virtue of the right and duty of the Government to carry out the stipulations of its treaties, it is likewise the *de jure* government of Cuba. The Cuban people have at the present time no essential right of a sovereign State. They have no "capacity to treat, to contract alliances, to make peace and war," nor even "the form of independence" to which Halleck refers in the paragraph cited. They have no government, for, notoriously, they are now endeavoring by means of a constitutional convention to construct a government to which the United States can and probably will commit the future control of the island. (See Appendix V, p. 122.)

XIII.

THE CUBAN REVOLUTION.

The learned counsel for the appellant has devoted a considerable portion of his able brief to an exhaustive history of the Cuban revolution, and he claims that this establishes the fact that there was a government in Cuba prior to the treaty of Paris, and that this country had recognized such country as an independent and sovereign nation. While we might object to much of the matter which the learned counsel for appellant has inserted in this portion of his argument as not being sufficiently official to require this court to take judicial cognizance of it (as, for example, the voluminous quotations from the statements of Mr. Palma, whom this Government declined to receive as a representative of the alleged government), yet such objection is not necessary, as all of the matter quoted, while forming an interesting history of the Cuban revolution, is singularly inconclusive in establishing the desired proposition that this Government ever recognized a government in Cuba.

On the contrary, appellant's counsel has unwittingly established the very converse of his proposition by showing that this Government both before the Spanish-American war began and subsequent to the treaty of Paris uniformly refused to recognize the alleged Cuban government, or to treat with it as such. And as appellant's counsel admits that the action of the political branch of the Government is binding upon this court, a proposition in which we heartily concur, it follows neces-

sarily that this court must accept the view of the political branch of the Government, that there is not and never has been a Cuban government possessing sufficient attributes of sovereignty to warrant its recognition by the family of nations.

In this connection, care must be taken to distinguish between a recognition of the existence of a *people* and recognition of the existence of a *nation*. It has already been pointed out that these are not convertible terms. Congress, by the joint resolution of April 20, 1898, did unquestionably recognize that there was a Cuban *people*, which, by a successful insurrection, had become practically independent of the rule of Spain; but not only in selecting the word "people" instead of the word "nation," but in defeating and excluding the proviso which called for the recognition of the "Cuban republic," Congress emphatically excluded the idea that there was any nation sufficiently organized to warrant recognition. The reports of Senate committees, quoted by appellant to show the existence of an insurgent government, are valueless when the same reports contained the admission that the United States had refused to recognize its accredited representative. The appellant has shown that Mr. Palma, as the accredited diplomatic delegate of the alleged republic of Cuba, asked that he be received and recognized as such, and that such reception and recognition were uniformly refused. Moreover, attempts which were made in Congress to recognize the Cuban republic were, as stated by the appellant, defeated, and we are at a loss to know what possible value there is in quoting the reports of

committees which urged that such resolution should be adopted. In all attempts by Presidents Cleveland, Harrison, and McKinley, made to bring to an end the insurrection in Cuba, our country dealt directly with Spain as the recognized sovereign in Cuba, and our country has uniformly refused even to recognize the insurgents as belligerents.

Even after the explosion of the *Maine*, the President, on March 27, 1898, as stated in appellant's brief, submitted to the Spanish Government suggestions that the President would use his good offices to bring to an end the insurrection. (Appellant's brief, p. 27.) Some nine resolutions were offered in Congress, all looking toward the recognition of the Cuban republic, none of which was ever passed by Congress. We agree with appellant's counsel that if they had been passed they would not have been binding on the Executive, as the recognition of a new State is the exclusive function of the executive and not of the legislative department of the Government.

On April 11, 1898, the President addressed a message to Congress in which he asked for authority "to take measures to secure a full and final termination of hostilities between the Government of Spain and the people of Cuba, and to secure in the island the establishment of a stable government." The distinction between the "Government" of Spain and the "people" of Cuba will be noted, and also the fact that the effort of the President was not to recognize an existing government in Cuba, but "to secure the establishment of a

stable" one. In this message the President said, with especial reference to the subject under discussion:

> It is to be seriously considered whether the Cuban insurrection possesses beyond dispute the attributes of statehood, which alone can demand the recognition of belligerency in its favor. The same requirement must certainly be no less seriously considered when the graver issue of recognizing independence is in question. * * * Such recognition is not necessary in order to enable the United States to intervene and pacify the island. To commit this country now to the recognition of any particular government in Cuba might subject us to embarrassing conditions of international obligation toward the organization to be recognized. In case of intervention our conduct would be subject to the approval or disapproval of such government. We should be obliged to submit to its direction and to assume to it the mere relation of a friendly ally.

The Senate committee thereupon recommended a resolution, the first paragraph of which read as follows:

> First. That the people of the island of Cuba are, and of right ought to be, free and independent, *and that the Government of the United States hereby recognizes the republic of Cuba as the true and lawful government of the island.*[1]

The report of the committee, which is fully quoted in appellant's brief (p. 30), shows that the committee did not think that there then existed a responsible and stable government, for the first paragraph (appellant's brief, p. 30) contemplates the recognition of "the independence of the people of Cuba," the intervention of the United

[1] The portion italicized was stricken out by Congress.

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States to terminate the war, and then it significantly adds, "and that such independence shall become a settled political fact at the earliest possible moment by the establishment by the free action of the people of Cuba, *when such action can be had*, of a government independent in fact and form."

If, therefore, the committee's views are of any binding value, they did not contemplate the continuance of the alleged Cuban republic, but the creation by the people of Cuba of a new government when the war had terminated; and this was accepted by Congress when it struck out of the first paragraph of the resolution the recognition of "the republic of Cuba as the true and lawful government of the island."

The second paragraph, far from recognizing the Cuban republic, recognizes the Government of Spain as the *de facto* government in Cuba, for it provides that "the Government of the United States does hereby demand that the Government of Spain at once relinquish its authority and government of the island of Cuba, and withdraw its land and naval forces from Cuba and Cuban waters."

While Congress did, in the fourth paragraph of the joint resolution, disclaim "any disposition or intention [on the part of the United States] to exercise sovereignty, jurisdiction, or control over said island," yet it so far qualified this disclaimer as to say "except for the pacification thereof, and asserts its determination when that is accomplished to leave the government and control of the island to its people." This clearly indicates the intention of the United States to intervene and control and govern the island, in order to pacify it, and only to relinquish such

government and control when its pacification is accomplished. It will also be noted that such control is to be relinquished, after the period of pacification, "to its people." In all of these state documents the utmost care has been taken to distinguish between the people of Cuba and any alleged Cuban state or nation.

If any doubt existed as to the intention of this Government at the outbreak of the war, subsequent events make it clear beyond question that this Government never recognized the Cuban nation. Thus the act of April 25, 1898, which formally declared war (appellant's brief, p. 35), provides "that war be, and the same is hereby, declared to exist, and that war has existed since the 21st day of April, 1898, including said day, between the United States of America and the Kingdom of Spain." It will be noted that the alleged Cuban republic is expressly excluded, and this is the more striking as the Cuban insurgents were never recognized as belligerents. If there had been any intention to recognize the insurgent government the resolution would have read that war existed "between the United States of America and the republic of Cuba, on the one hand, and the Kingdom of Spain."

The entertaining account of the war which is set forth in appellant's brief does not in any wise impair these conclusions or strengthen his proposition. That the Cuban insurgents did cooperate with our armies is unquestionably true; but our acceptance of such cooperation simply made them our soldiers and no more operated as a recognition of their government than our acceptance of the

assistance of Aguinaldo operated as a recognition of the alleged Philippine republic.

A nation may accept the assistance of organized bodies of men without recognizing that they are the official army of a recognized nation. Thus the great Napoleon accepted the assistance of the Poles, but he refused to acknowledge the independence of Poland as against Russia.

This conclusion is made entirely clear by the following facts:

When Santiago capitulated it was to the United States Government and not to the United States Government and the Cuban republic. Upon such capture the United States at once asserted exclusive sovereignty in Santiago. See Executive order of the President, dated July 13, 1898, promulgated by authority of the Secretary of War, quoted in appellant's brief, p. 44, in which he asserted the exclusive authority of the United States and excluded the suggestion that the people of Cuba owed any allegiance to any other power. Thus the President says:

> The judges and the other officials connected with the administration of justice may, *if they accept the supremacy of the United States*, continue to administer the ordinary law of the land as between man and man, under the supervision of the American Commander in Chief.

Had our Government recognized the existence of a Cuban republic, it is manifest that such claim could only be an unfriendly act to the Cuban republic. It is not to be assumed that the United States, with one war on its hands, was virtually declaring war on another government, and that government, according to appellant's contention, our ally. The more reasonable assumption is

that there was no intention to recognize the Cuban government, and that, therefore, under the law of nations the sovereignty of Santiago and the surrounding territory passed from the conquered to the United States as conqueror.

The signing of the protocol of August 12, 1898, fully confirms this view. In no way does it suggest the existence of a Cuban government as a factor in the case. The alleged Cuban republic was not a party to it, or in any way recognized by its terms. It was purely a provisional treaty between the representatives of the United States and Spain. (See 30 Stat. L., p. 1742.)

In accordance with the protocol the United States and Spain each sent five commissioners to Paris. The alleged Cuban republic neither asked to be represented by its own commissioners, nor was it represented at the sessions of the Peace Commission. If the Cuban people had been of opinion that their government was a government in fact (and not in mere name), it is inconceivable that they would not have claimed representation upon the Peace Commission in a matter affecting themselves and their own country. The treaty, like the protocol, disproves the whole theory upon which appellant's counsel bases his argument. In none of its many paragraphs is there any recognition of a Cuban government. The only signatory parties are the United States and Spain. Article I directly provides for a transfer of both the authority and the responsibility for the government of Cuba by Spain to the United States. It says:

> Spain relinquishes all claim of sovereignty over and title to Cuba.

> And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

Article XVI expressly excludes the assumption that the alleged Cuban republic in any way shared either this authority or these obligations, for it provides that, after the United States has terminated its occupancy of Cuba, it will advise any government established in the island *to assume the same obligations.* The paragraph in full is:

> It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will upon the termination of such occupancy advise any government established in the island to assume the same obligations. (30 Stat., 1761.)

This treaty was, of course, ratified by the Senate and became the law of the land, and if it be true, as contended by appellant, that the joint resolution of April 20, 1898, operated as a recognition of the Cuban republic, then it was competent for this country, in adopting a treaty, to withdraw such recognition, and such is the effect of both the protocol and the treaty of Paris.

The events which followed the treaty of Paris, and described at length in appellant's brief, equally disprove his theory that the Cuban republic was ever recognized by this Government. They show that the United States at once assumed, and still maintains, exclusive sovereignty. Thus, on January 1, 1899, the Spanish Governor-General made formal surrender of Cuba to the United

States. (Appellant's brief, p. 54.) The American and not the Cuban flag was at once raised as a symbol of dominion. The alleged Cuban government, far from complaining at this course, at once recognized both its justice and wisdom. Its army disbanded and accepted payment from the Treasury of the United States. Its civil government, if it had any, dissolved as quickly, and from that day to this there has not been even the pretense of an independent government in Cuba, or any claim for recognition as such. On the contrary, the court will take judicial cognizance of the fact that the Cuban people, under the supervision and control of our Government, are now met in constitutional convention, not for the purpose of amending any constitution or continuing any government which they had, but to create and form an entirely new one. (See Appendix V, p. 122.)

If any doubt could possibly remain, the action of Congress conclusively determines the question, for we entirely agree with the appellant's counsel that this court must accept the action of the political department of the Government. There may be a question as to whether the Executive or Congress, or both together, have the right to recognize, or to refuse to recognize, a new government; but in this case both the Executive and Congress have until the present time refused to recognize the Cuban government, and have consistently recognized, since the treaty of Paris, our own Government as the sovereign power in Cuba. (See acts of Congress cited in appellant's brief, pp. 65–67.)

The very act which is now under consideration by the court was admittedly passed by Congress with direct

reference to the island of Cuba and with the purpose of aiding the President to govern it as long as it is subject to the dominion of the United States.

The fact that our sovereignty may be temporary in character can not affect its essential nature. Sovereignty is none the less sovereignty, even though it be voluntarily or involuntarily terminated.

In *Leitensdorfer et al.* v. *James J. Webb* (20 Howard, 176) it appears that the Army of the United States, having acquired by conquest in 1846 part of the territory of New Mexico, General Kearny, who held possession for the United States by virtue of the power of conquest and occupancy, etc., under the sanction and authority of the United States, directed a provisional or temporary government for the acquired territory and instituted a provisional judicial system.

The court held, among other things:

> Of the validity of these ordinances of the provisional government there is made no question with respect to the period during which the territory was held by the United States as occupying conqueror, and it would seem to admit of no doubt that during the period of their valid existence and operation these ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them.

In that case it was contended that whatever may have been the rights of the occupying conqueror, as such, they were all terminated by the termination of the belligerent attitude of the parties, and that at the close of the contest every institution which had been overthrown or suspended would be revived and reestablished.

The court, in passing upon such contention, says:

> The fallacy of this pretension is exposed by the fact that the territory never was relinquished by the conqueror, nor restored to its original condition or allegiance, but was retained by the occupant until possession was matured into absolute permanent dominion and sovereignty.

The leading case of *Cross* v. *Harrison* (16 How., 164) is to the same effect and seems conclusive of this branch of the argument. In that case the President had, during the Mexican war, taken possession of California as conquered territory. Early in 1847 he authorized the military commander in California to form a civil government for the conquered country, and, *inter alia*, to impose duties on imports as military contributions. A treaty of peace was signed February 3, 1848, and ratifications exchanged on May 30, 1848. On March 3, 1849, Congress made the port of San Francisco a collection district, and on November 13, 1849, a collector of the port, appointed by the President, entered upon the execution of his duties. The duties under the war tariff were collected from the ratification of the treaty to the day that the collector entered upon his duties, and this court held that they were rightfully exacted. In so holding the court affirmed the legality of the military government which existed after the treaty of peace and the cessation of hostilities and until Congress had legislated for the civil government of California. Mr. Justice Wayne says:

> The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated

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for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power also to admit new States into this Union, with only such limitations as are expressed in the section in which this power is given. The government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the government. And the more so as it was continued until the people of the territory met in convention to form a State government, which was subsequently recognized by Congress under its power to admit new States into the Union.

Again the court says:

Our conclusion, from what has been said, is that the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the

> treaty or from its ratification. We think it was continued over a ceded conquest without any violation of the Constitution or laws of the United States, and that until Congress legislated for it the duties upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason.

This court will take judicial cognizance as to the purpose of the present occupation of Cuba. The authoritative declaration of the President, in his message of December 6, 1898, may be noted:

> As soon as we are in possession of Cuba and have pacified the island, it will be necessary to give aid and direction to its people to form a government for themselves. * * * Until there is complete tranquillity in the island and a stable government inaugurated military occupation will be continued.

The declaration of Congress meant nothing more than that the inhabitants of Cuba, by long sacrifices, had earned their independence, and that, on the other hand, Spain, by her misrule, had, according to ethical standards rather than by any canon of international law, forfeited her moral right to rule the Cuban people further. This assertion of an ethical principle was fortified and made good by altogether different cannon, and by force of arms we compelled Spain to relinquish her title to Cuba. But we did not compel her to cede such sovereignty or title to us or to any other power, but simply provided that we should occupy it, and that, pending such occupation, this nation should be responsible for the protection of life and property.

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This court, as has been stated, will take judicial cognizance of the fact that, with our approval, and under our supervision, the Cuban people are now assembled through their representatives in constitutional convention, and that, if they shall succeed in organizing a government which gives assurance of ability to rule Cuba, this nation can then abandon its occupation and surrender its rights and responsibilities to such new government. But it is evident that such time has not yet arrived. The Cuban constitutional convention may decline to form a government, and ask for admission into the United States either as a State or Territory. It may, on the other hand, organize a government with which this country will not be satisfied; or this country may ask such indemnity for its undoubted sacrifices that the Cuban government may be unable or unwilling to meet the demands of this Government, just or unjust. In other words, there is no Cuban government at the present time, and no certainty that there ever will be one. (See Appendix V, p. 122.)

This anomalous condition is by no means without precedent. By a convention made between Turkey and Great Britain June 4, 1878, Turkey agreed "to assign the island of Cyprus to be occupied and administered by England," in order to enable her to execute certain engagements in the treaty, Cyprus to be evacuated and restored if Russia restored certain conquests made in Armenia. It was stipulated that the Sultan "transferred to and vested in Her Majesty the Queen for the term of occupation and no longer, full powers for making laws and conventions for the government of the island in Her

Majesty's name * * * free from the Porte's control. (1 Halleck's International Law, 3d ed., p. 70, note.)

This is virtually an occupation in trust, to be terminated upon a contingency specified.

The international convention of November 17, 1885, put the British in military occupation in Egypt to restore order and secure the holders of the Egyptian bonds, to be terminated upon "the assurance of the stability and successful operation of the Egyptian Government." (6, Calvo, Droit International, pp. 14, 15.) This is a trust, so to speak, for the Egyptian bondholders (subjects of the signatory powers), with a remainder over to the sovereign power, the Porte.

All these examples show that powers may, by treaty, assume something less than the absolute responsibilities of annexation, and something more than mere protectorates.

Ortolan recognizes (Diplomatic de la Mer, liv. ii, ch. xiii) "definitive occupation" as well as "incorporation" of a subject territory, as subjecting it to military government. While the superior power is in "exclusive possession" of foreign territory, other nations must respect it as the territory *pro tempore* of the power in possession, as alone able to fulfill international obligations. (2 Halleck, 3d Edn., 444, citing *Fleming* v. *Page*, 9 How., 615.)

To sum up, the United States assumed control of Cuba by conquest, confirmed by treaty, in which it limited its own occupation by the happening of a definite contingency, of which it is the final and only judge.

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XIV.

CUBA, TERRITORY PRO TEMPORE, OF UNITED STATES.

Cuba is therefore "territory *pro tempore*" of the United States. The President is not, therefore, as contended by appellant, setting up "a military government in a friendly State in a time of peace," for Cuba is not a State at all; on the contrary, Cuba at present is territory of the United States, occupied by our soldiers, both under the war-making power and under the treaty-making power, and, under the treaty of Paris, it is wholly a question for the political branch of the Government when, and if ever, such military occupation shall cease.

If it be argued that "territory *pro tempore*" is without constitutional authority, it can be said that, while such a possibility may not be expressly recognized in the Constitution, yet, when its framers gave to the Federal Government the power to make war and conclude treaties, it did not pretend to prescribe the bounds or limits of such authority. In concluding a war and securing the fruits of conquest, military occupation is necessarily implied in the war-making power, and if this were not so, it must be clear that the power to make a treaty must carry with it a right to make some disposition of the conquered country. No one ever questioned this until the present case.

XV.

POLITICAL DEPARTMENT EXCLUSIVE JUDGE OF NECESSITY OF OCCUPATION.

Conceding, therefore, the right to make such a treaty, there must be the right to carry it out, and, if there be the right to carry it out, there must be the right to employ such means as may be necessary for such purpose; and these means are left to the political branch of the Government. It is therefore a question either for Congress, or for the President, or both, when to determine the period of military occupation. Thus, "in February, 1866, it was resolved by Congress that the condition of the former Confederate States fully justified the President in maintaining the suspension of the writ of *habeas corpus* in those States, and that the condition of those States fully justified the President in maintaining the military possession and control of them." (2 Halleck, 3d ed., p. 443, note.)

In 1866 Congress approved the President's act in continuing military "pacification" of "friendly States" where a condition of "peace" obtained with the surrender at Appomattox.

In 1899, after the establishment of "peace" in Cuba by the ratification of the Spanish treaty, Congress expressed its approval of the military occupation of the island, which it is here contended is usurpation.

An act was before them for the maintenance of the Regular and Volunteer Army. This was passed with a proviso limiting the scope of the military government of Cuba in one particular only, and by implication approv-

ing it and consenting to its continuance as a military measure. (See 30 Stat., ch. 423, sec. 2, p. 1074):

> That no property, franchises, or concessions of any kind whatever shall be granted by the United States, or by any military or other authority whatever, in the island of Cuba during the occupation thereof by the United States.

Little need be said upon this branch of the argument, as the learned counsel for appellant concedes it if the original treaty be constitutional. (See *New Orleans* v. *Steamship Co.*, 20 Wall., 387.)

XVI.

Exercising such sovereignty, the United States has the power, and it is its duty, under the treaty of Paris, to enact such legislation as will aid the President to protect life and property in Cuba.

Given, therefore, the power to protect life and property in Cuba, as we are obliged to do under our treaty stipulations, there must be as the very first necessity the right either to recognize the civil courts which were in existence at the time the war was declared, or, if the exigencies of the case require it, to create new courts; and if there is power to erect courts or recognize existing ones, there must be the equal power to provide procedure for the administration of justice therein; and if there is such power, then, as part of such procedure, it follows as a necessary conclusion that Congress can provide for the transfer of a criminal from where he is found to the place where he committed his offense.

Such legislation has long been in force in this country,

and is embodied in section 1014 of the Revised Statutes, whereby it is provided that—

> For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

The appellant squarely denies the right of this country to legislate for Cuba. He claims, in effect, that this court should determine that its further occupation by the United States is without justification, and that, therefore, all legislation which has been made to carry out our treaty obligation to protect life and property is void for want of authority. His contention, carried to its logical conclusion, is that if Neely had set fire to the city of Habana or had assassinated one of the judges of the courts and had

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fled to the United States, our country is so impotent to discharge its treaty obligations that it can not legislate for the removal of the fugitive to Cuba.

Fortunately the United States is no such weakling. In its foreign relations at least it lacks no attribute of a sovereign and independent power. By the great declaration which constituted it a people it was asserted that "As Free and Independent States, they have *full Power* to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." Moreover, in the same great instrument the spirit in which our international relations were to be conducted was indicated by the immortal preamble, than which its great writer never sounded a truer or nobler note. It recites that, "When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation."

In other words, the great declaration recognized that the new nation was one of a family of nations, and that this family of nations constituted a government—the government of civilization—bound by a law which was equally obligatory upon each member of the family, and that this law of international obligation rose higher than the selfish interests or peculiar policies of any one people. Moreover, it can be urged that the very weakness

of the nation under the Articles of Confederation in discharging its international obligations to other powers caused it to enact the Constitution of the United States; for the object, as stated, "to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defense, promote the general Welfare."

As was said by Mr. Justice Bradley in the *Legal Tender Cases* (12 Wall., 554):

> The Constitution of the United States established a government, and not a league, compact, or partnership. It was constituted by the people. It was called a government. In the eighth section of Article I it is declared that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof. As a government it was vested with all the attributes of sovereignty. * * *
>
> The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country—war, peace, and negotiations and intercourse with other nations; all which are forbidden to the State governments. * * *
>
> Such being the character of the General Government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which at the time of adopting the Constitution were generally considered to belong to every government as such, and as being essential to the exercise of its functions. If this proposition be not

> true, it certainly is true that the Government of the United States has express authority in the last clause quoted to make all such laws (usually regarded as inherent and implied) as may be necessary and proper for carrying on the Government as constituted and vindicating its authority and existence.

As to the binding force of the law of nations the Supreme Court has spoken in no uncertain terms in the very recent case of *The Paquete Habana* (175 U. S., 677–700), where it is said:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.

While the power to govern Cuba, and, incidentally, to punish crime therein, can be properly traced to the power to make war, and the equal power to make treaties, yet it can also be placed upon the broader ground of the inherent right of the United States as a sovereign power to govern that which it acquires. To quote the language of this court in *Jones* v. *United States* (137 U. S., 212):

> By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one

nation, in its name and by its authority or with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. (Vattel, lib. I. c. 18; Wheaton on International Law, 8th ed., §§ 161, 165, 176, note 104; Halleck on International Law, C. 6, §§ 7, 15; 1 Phillimore on International Law, 3d ed., §§ 227, 229, 230, 232, 242; 1 Calvo Droit International, 4th ed., §§ 266, 277, 300; *Whiton* v. *Albany Ins. Co.*, 109 Mass., 24, 31.)

In this connection it must be observed that the extent of sovereignty is not coterminous with acknowledged territorial boundaries. There is an extraterritorial sovereignty, both as an abstract and as a practical proposition. The exclusive sovereignty of the United States may be confined to its territorial domains, but beyond these domains its sovereignty extends concurrently with that of other nations wherever there is no exclusive sovereignty in another nation. Thus the United States exercises sovereignty on the high seas, as does every other nation. As has been shown by international law, sovereignty follows the flag of a conquering army, even though conquered territory does not thereby become a portion of the country as a political entity.

Fleming v. *Page* (9 How., 603) and *United States* v. *Rice* (4 Wheat., 246) both illustrate this fact. In the

former, Tampico had been captured by our army in the year 1847, and it was claimed that as it was subject to our jurisdiction and control and under our dominion, it had ceased to be foreign to us and had become a part of the United States, and that therefore goods imported into the port of Philadelphia from Tampico during its occupation by our troops were not subject to the payment of tariff duties under our revenue laws. This court held, however, that while it was internationally, i. e., as against other nations, the territory of the United States, yet it was not a part of the Union within the meaning of the Constitution. Chief Justice Taney said:

> A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the Government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As Commander in Chief he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States,

But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

It is true, that when Tampico had been captured and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possessions continued, as the territory of the United States, and to respect it as such; for, by the laws and usages of nations, conquest is a valid title while the victor maintains the exclusive possession of the conquered country. * * * *As regarded by all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries; but yet it was not a part of the Union*, for every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws; and the relation in which the port of Tampico stood to the United States while it was occupied by our arms did not depend upon the law of nations, but upon our own Constitution *and acts of Congress*. (*Fleming* v. *Page*, 9 How., 603, 615.)

In the latter case of *United States* v. *Rice*, the port and town of Castine, in the State of Maine, was captured by the British troops on September 1, 1814, and was held until the conclusion of the war in February, 1815. During this period the British Government exercised all civil and military authority over the place and established a custom-house and admitted goods to be imported according to regulations established by itself. After the conclusion of the treaty of peace and the surrender of Castine to our troops our Government sought to collect the tariff duties on goods which had been imported into Castine by one of its citizens. In an opinion by Mr.

Justice Story this court held that such duties could not be exacted, and said:

> By the conquest and military occupation of Castine the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty there can be no claim to obedience.

That our occupation of Cuba is now under the treaty-making and no longer under the war-making power, can not affect the question, unless the treaty incorporates Cuba within the political limits of the United States. If, for the purpose of bringing the war to a conclusion, a treaty is made which requires us to occupy Cuba for a definite purpose and a limited time, the situation is not materially different from such occupation during the progress of the war; and while, therefore, Cuba is now undoubtedly subject to our jurisdiction, and while we are exercising all the rights of sovereignty in that island, both in civil and military affairs, yet Cuba has not become a part of the United States and can not, unless Congress should accept it as an integral part of the Union. Until such time, it may be land "appertaining

to the United States," an expression used by this court in *Jones* v. *United States* (137 U. S., 202), to describe the relation which our Government bears to certain guano islands in the Caribbean Sea.

This case throws a strong light upon the exact political status of Cuba, as well as upon our right to pass the act of June 6, 1900, and proceed thereunder. The plaintiff in error had been sentenced to death under an indictment which charged him with the murder of one Foster at the island of Navassa, "a place which then and there was under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any particular State or district of the United States * * * and which was then and there recognized and considered by the United States as appertaining to the United States, and which was also then and there in the possession of the United States under the laws of the United States then and there in force relating to such islands." The defendant was tried in the judicial district of Maryland under section 6 of the act of August 18, 1856 (11 Stat., 119), which provided that "all acts done and offenses or crimes committed on any such island, rock, or key, etc., shall be held and deemed to have been done and committed on the high seas, on board a merchant ship or vessel belonging to the United States, and be punished according to the laws of the United States relating to such ships or vessels and offenses on the high seas, which laws for the purposes aforesaid are hereby extended to and over such islands, rocks, or keys." Under section 1 of the said act it was provided that "When any citizen of the United States shall discover a deposit of guano on any island, rock, or

key not within the lawful jurisdiction of any government, and not occupied by the citizens of any other government, and shall take peaceable possession thereof and occupy the same, said island, rock, or key may, at the discretion of the President of the United States, be considered as appertaining to the United States."

It was contended by the plaintiff in error that the act, both with respect to the acquisition of the island as well as the section punishing offenses committed thereon, was unconstitutional for want of power. The Supreme Court negatived this contention, and in deciding the case approved the following propositions:

(1) By the law of nations, when citizens of one nation, with its authority and assent, take and hold actual, continuous, and useful possession of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired.

(2) Who is the sovereign *de jure* or *de facto* of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens, and subjects of that government.

(3) Courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence nor in accord with the pleadings.

(4) Congress may direct where and how a crime not committed within any State of the Union may be tried, and this legislation to punish in the nearest judicial district a crime committed at Navassa, in accordance with admiralty laws, was constitutional.

Applying the principle of this decision to the case at bar, it would seem that this court will not question the sovereignty which the Government, by reason of its treaty and supplementary legislation of Congress, is now exercising in Cuba, but will recognize it; and that, by reason of such sovereignty, Congress has full right, as in the Navassa case, to provide for the punishment of crimes committed in Cuba, and to provide the place and means for such punishment. (Constitution, Art. III, sec. 2.)

The United States thus acquired sovereignty in Cuba by its military occupation, and such right was affirmed and continued by a treaty by which Spain relinquished its claim of sovereignty and affirmed that of the United States.

XVII.

APPLICATION OF CONSTITUTIONAL GUARANTEES AS TO JURY TRIAL.

It is argued, however, that if Cuba is to be treated as domestic territory—as a part of the "outlying dominion of the United States," to use the expression of Chief Justice Waite—then, that the prohibitions of the bill of rights requiring an indictment of a grand jury and jury trial forbid Neely's removal to the courts of Cuba where the civil law is administered. But a reference to

the decisions of this court will show that these provisions, governing the procedure in criminal cases, do not apply to the territories of the United States, unless Congress expressly makes the Constitution applicable to such newly acquired territories.

While, in the case of *Callan* v. *Wilson* (127 U. S., 540), it was held that a man accused of a misdemeanor in the District of Columbia was entitled to trial by jury, this does not apply to the present case, because the District of Columbia was once a part of Maryland and therefore a part of the United States under the Constitution, and also because Congress expressly made the Constitution applicable to the State of Maryland. The two cases of *Webster* v. *Reid* (11 How., 437) and *Reynolds* v. *United States* (98 U. S., 145) are likewise inapplicable, because both cases arose in Territories, the first in Iowa and the second in Utah, to which Congress had expressly extended the Constitution, the first by the ordinance of 1787 and the second by the act of September 9, 1850. That this distinguishes these cases is shown by the later case of *American Publishing Company* v. *Fisher* (166 U. S., 464), in which this court held that a Territorial law of Utah authorizing a verdict when nine or more jurors concur, was invalid because Congress had extended the Constitution and laws to the Territory of Utah, and in this case Mr. Justice Brewer, in delivering the opinion of this court, distinguished the cases of *Webster* v. *Reid* and *Reynolds* v. *United States* on the lines indicated. On the contrary, the Supreme Court has repeatedly held that the States may do away with indictment by grand jury

and trial by petit jury in criminal cases, and that no fundamental rights under our Constitution or form of government are violated. (*Hurtado* v. *California*, 110 U. S., 516; *Maxwell* v. *Dow*, 176 U. S., 581.) *By what process of reasoning is the appellant entitled under the Constitution to a jury trial in Cuba, when he is not entitled to it in an existing State of the Union, if there abolished?* As was well argued by the present Solicitor-General in his address on the Constitution and the Territories, delivered at the annual meeting of the Pennsylvania Bar Association, on June 26, 1900:

> If the constitutional guarantees relating to indictment by a grand jury and trial by a petit jury are not fundamental in character, and therefore do not tie the hands of the inhabitants of a Territory when organizing a State, how can they tie the hands of the President and Congress in preserving order and protecting life and property in our new possessions?

The Solicitor-General continues his address with an argument upon this point which is stated with admirable clearness and convincing force:

> It is a strange contention that as soon as the treaty went into effect the power of the President and Congress to preserve order in the new possessions ceased. There were no grand juries, no petit juries, no machinery for punishing crime by the processes of the Anglo-Saxon law, and yet, if the limitations of the Constitution *ex proprio vigore* extended over these possessions, crime could be punished in no other way. The Constitution which gave the United States the power to acquire territory by treaty, and imposed upon Congress the duty of disposing of and governing it, did not leave the national government help-

less by demanding impossibilities. Until the progress of the people of these territories, their civilization and education, will permit of the organization of courts and juries after our system, these guaranties must be held inoperative, or the preservation of peace and order and the protection of life and property be abandoned.

The case of *In re Ross* (140 U. S., 453) clearly decides that the constitutional provisions as to jury trials have no application to cases arising outside of the accepted territorial limits of the Government, and therefore could have no application to Cuba, which, while subject to the jurisdiction of the United States, is not within its territorial limits. In that case Ross, who committed murder on board of an American ship in the harbor of Yokohama, was tried and sentenced to death by an American consular court in Japan. This consular court had been established by Congressional legislation made in execution of treaties, precisely as the present legislation is by virtue of the treaty-making power. The constitutionality of this legislation was affirmed, and although Ross had been convicted without previous presentment of a grand jury, or, indeed, a jury trial, yet the conviction was sustained.

> When, therefore, the representatives or officers of our Government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, can not invoke the protection of the provisions

> referred to until brought within the actual territorial boundaries of the United States. And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guarantees in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guarantees of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture. (140 U. S., 464, 465.)

Applying this principle to the present case, it would seem clear that "the representatives or officers of our Government are permitted to exercise authority" in Cuba by reason of the treaty of Paris, whereby such right was conferred upon us. While Cuba is territory subject to our jurisdiction, it is not territory which has been ac-

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cepted or incorporated within the constitutional boundaries of the United States. The guarantees, therefore, of trial by jury have no application in such island.

In this connection the prophetic words of Mr. Justice Brown in the case of *Hodden* v. *Hardy* (169 U. S., 366) may be profitably recalled:

> In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system, which represented the growth of generations of inhabitants, a juri-prudence with which they had had no previous acquaintance or sympathy.

If these considerations are of potent force with respect to territories which have been permanently acquired by treaty or conquest, and which we propose to make an integral part of our national domain, *a fortiori* they apply to a peculiar and exceptional exigency such as our present relation to Cuba presents. If Cuba had been ceded by the treaty of Paris, as Porto Rico and the Philippines, the right of Congress to legislate for the removal of criminals to such islands could not be seriously disputed, and the folly of tearing up by the roots the methods of legal procedure which had existed there for centuries under the civil law would be equally apparent. This folly would be greater if, when our occupation

is temporary in its character, and its object is pacification, we, either, on the one hand, interfere with their methods of administering law, or, on the other hand, in defiance of the comity of nations and of the usages of the civilized world, make our nation an asylum for criminals fleeing from the outraged justice of such island.

XVIII.

EX PARTE MILLIGAN.

Counsel for appellant relies mainly upon the famous case of *Ex parte Milligan* (4 Wall., 2). But the two cases are widely dissimilar, and the Milligan case, while unquestionable law, does not rule this case. In this case Milligan, a citizen of the United States, and in no way connected with either the military or naval service of the United States, was arrested in the district of Indiana by a general of the Army, and tried and sentenced to death by a military commission. The court found that he was not a resident of the rebellious States and that the civil courts of the State of Indiana were then in session and were fully competent to try him for any act of treason against the United States. The court further found as the chief ground of its decision that, although the State of Indiana had been placed within the limits of a military district, and had been throughout the war threatened with a possible invasion, that this did not constitute Indiana "the theater of military operations." This court said in this connection (p. 126):

> If armies were collected in Indiana, they were to be employed in another locality, where the laws were

> obstructed and the national authority disputed. On *her* soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law can not arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.
>
> It is difficult to see how the *safety* of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them until the Government was prepared for their trial, when the courts were ready and open to try them.

As to the occasions when martial law can be properly applied, this court says (p. 127):

> If, in foreign invasion or civil war, the courts are actually closed and it is impossible to administer criminal justice according to law, *then*, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the Army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.

This case differs from the case at bar in the following essential respects:

(1) Milligan was not in any manner connected with the military service, while Neely, according to appellant's theory, although not a soldier, was yet connected with the postal service, which had been established by the military commander, and as such was justly subject to military, although not to martial, law.

(2) No condition of war existed in the State of Indiana, but in the present case there is constructively a condition

of affairs which, while they may not be styled a "state of war," yet require military rule. The conquering armies of the United States displaced the sovereign authority in Cuba; and until a new civil government is constituted by the people of Cuba, its occupation by the United States is essentially a military occupation, and as such, military law would apply.

(3) Milligan was sentenced by a court-martial, composed of army officers, whereas the Government seeks to subject Neely to a trial by the civil courts of Cuba. In this respect the two cases differ as day from night. This court reversed the sentence of death because Milligan was not tried by the civil courts which were then open, but by a military commission. In this case, in the spirit of this decision, the Government seeks to try Neely not by court-martial, but by the recognized criminal courts of Cuba which existed prior to the war and whose existence the war has not interrupted. We are therefore doing precisely that which this court said should be done in *Ex parte Milligan*.

The criminal courts of Cuba may exist by sufferance of the military commander, but this does not make them less civil, and not military courts.

The President stated the law of nations with regard to the state of a conquered country with accuracy in his communication of July 13, 1898, already quoted, when he said:

> Though the powers of the military occupant are absolute and supreme, and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect

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> private rights of person and of property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent, and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion.

In accordance with this Executive order, General Brooke, the military commander, on April 14, 1899, recognized the existing civil courts, including the court which subsequently indicted Neely for the embezzlement of the Cuban postal funds. As appears by the petition for the *habeas corpus*, the judges of these courts are native Cubans and administer the Spanish law as it was prior to the war. The judges are not, therefore, officers of the Army, and, while it is true that they exercise their functions by permission of the military governor, yet such is always the case when a country is conquered and the conditions do not require the suppression of its local tribunals, and it has never been contended that if a conquering invader permits the local courts to continue to administer justice that that consideration makes them military courts.

They do exist by virtue of military government, and by virtue of the law of nations, but, as has been pointed out by this court, military law must not be confounded with martial law. (See *Ex parte Milligan*, 71 U. S., 2.)

As, therefore, Neely, an employee of the military department of Cuba, is to be tried by the local courts of

Cuba, composed entirely of civilians, and administering, not martial law, but the law of Cuba as it existed prior to the Cuban war, it is manifest that the case does not fall within the ruling of *Ex parte Milligan*, where a civilian, disconnected with the military service, was tried, not by the civil courts or by the procedure of civil law, but by a court-martial, in accordance with martial law.

Judge Lacombe clearly expresses this in his opinion in the case at bar as follows:

> Reference is made to *Ex parte Milligan* (71 U. S., 2), but that case is not at all in point. There a citizen was tried by military commission, not in a foreign country but in the State of Indiana, a portion of the United States not at the time a part of the theater of war, with civil courts organized and in full operation having jurisdiction to hear and determine all questions as to the offense with which he was charged. But there is no suggestion here that if remanded to Cuba Neely will be tried by a court-martial or otherwise than by a civil court, following the same procedure as that prevailing before the concession of Cuba's independence. And, indeed, if the criminal laws of the island be enforced solely by courts-martial that circumstance would not be a sufficient answer to request for extradition; having chosen the country in which to commit the crime, he must accept the tribunals which administer its laws.

These conclusions, even as to Cuba, are fortified by judicial precedents, and, while the decision in question is not of binding authority on this court, yet it may be referred to for the force of its reasoning, and is therefore make a part of this argument.

We refer to the very recent case of the *State of Louisiana* v. *Wm. A. Cox*, in which Cox was arrested by the police authorities of New Orleans, charged with having committed grand larceny in the city of Habana, island of Cuba. He was detained pending proceedings by the Federal Government to remove him to Habana, and while in custody his discharge was sought upon the same ground as is now urged in behalf of the present appellant, namely, that the United States was without authority to remove him for trial to Cuba, because Cuba was not territory subject to our jurisdiction. The opinion, which is not, to counsel's knowledge, reported in any legal publication, is appended to this brief, and will be found, infra, page 104. In substance the learned judge concluded as follows:

> Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as a part of the domain of the conqueror so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark. It might, therefore, with certainty be said that the island of Cuba, after its capitulation, remained an island of the United States until restored to her people.
>
> The treaty of peace binds the United States to occupy the island and to discharge the obligations resulting from such occupancy for the protection of life and property. It is given to the Spaniards the right to appear before the courts and has subjected them in matters civil and criminal to the jurisdiction of the country wherein they reside, pursuant to the ordinary laws governing the same, and it will

after its occupancy advise any government to assume the same obligations. These obligations are sacred to an oppressed people, and the faith of the United States is pledged to their fulfillment. It would be indeed a strange anomaly if a citizen of the United States could with impunity rob and plunder the people of Cuba and receive justification at the hands of the courts within the United States under the plea that Cuba is not a part of the United States. This court can not from patriotic or political motives determine the matter.

The court concludes:

The court is of the opinion that the use of the word "territory" in the section of the Revised Statutes referred to herein, is intended to embrace any portion of land over which the United States exercises control, sovereignty, dominion, and occupation. These essentials are all found in the existing conditions, and Cuba is unquestionably a territory within the intention of our law.

XIX.

That such sovereignty is a political and not a judicial question, and its exercise by the political department of the Government conclusively binds the judges as well as all other officers, citizens, and subjects of that Government.

This proposition needs little argument. It is abundantly fortified by the paragraph already quoted from the decision of this court in *Jones* v. *United States* (137 U. S., 202, *supra*, p. 47). The appellant must either deny the power of the Government to make the treaty or he must assert that the judiciary can determine the political question whether the pacification of Cuba has been ac-

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complished. Either proposition is untenable and can not be supported either by principle or authority. On the one hand, the right of the Government to agree by treaty with another power, with which it has been at war, to continue military occupation until peace and order are restored, can not be seriously questioned. Indeed, it could be urged that, apart from any treaty, it was the duty of the United States, after it chose to intervene between Cuba and Spain and make the quarrel of Cuba her own, to restore law and order in that unhappy island. The original occupation of Cuba, therefore, after the treaty had been ratified, was a lawful exercise of the treaty-making power, and the appellant, in denying the lawfulness of the occupation, is driven to the last resource of asserting, and asking this court to say, that there is no further necessity for such occupation. Such question can not be decided by the courts. It is a question for the political department of the Government. To decide it rightly requires an intimate knowledge of the present state of Cuba and of the efforts that are being made to construct a new government over the ruins of the old. Whether Cuba is pacified and whether the government now in process of formation is calculated to give a stable government are questions which concern the Commander in Chief of our Armies and our statesmen in Congress. This court is without the means or the power to decide it. To attempt to do so would be to usurp the prerogatives of the President as well as those of Congress.

This court is equally without power to impute to the President a desire to break a solemn pledge of the nation and to rule Cuba with the arbitrary power of a despot.

As was said by the great Chief Justice in *Foster* v. *Neilson*, (2 Pet., 253, 309):

> If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interest against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession and which it claims under a treaty; *if the legislature has acted on the construction thus asserted*, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of a nation is, as has been truly said, more a political than a legal question, and in its discussion the courts of every country must respect *the pronounced will of the legislature*.

XX.

CONCLUSION.

It may not be amiss, in conclusion, to test the soundness of appellant's contention by a consideration of its inevitable consequences. The appellant asks this court in effect to direct the immediate withdrawal from Cuba both of the army and civil officers. At present there is no government to replace our Government, and such a sudden and summary abandonment of our occupation might easily result in a state of anarchy, in which life and property would be sacrificed. If an attempt were made by any foreign nation to hold this country responsible for such destruction, on the ground that we had assumed by direct treaty stipulation to protect life and property in Cuba, could the United States take a more humiliating position than to defend its abandonment of a sacred trust

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on the ground that the Supreme Court had declared it wanting in authority to fulfill such treaty stipulations? In doing so, would we not be wanting in that "decent respect to the opinions of mankind" of which Jefferson wrote in the Preamble of the great Declaration?

To regenerate Cuba, to bring order out of chaos, to build a new and stable government on the ruins of the old, is not an easy task. Rome was not built in a day, and the creation of a responsible and independent Cuban government must necessarily require time, patience, and judgment. To discharge this momentous duty the widest discretion must be reposed in the political department of the Government. The functions of this court are not political, and it may well refuse to interfere with such discretion. It will assume that both the President and Congress are acting in the utmost good faith. The policy of the executive department of the Government is thus authoritatively stated by the President in his message of December 5, 1899:

> This nation has assumed before the world a grave responsibility for the future good government of Cuba. We have accepted a trust the fulfillment of which calls for the sternest integrity of purpose and the exercise of the highest wisdom. The new Cuba yet to arise from the ashes of the past must needs be bound to us by ties of singular intimacy and strength if its enduring welfare is to be assured. Whether those ties shall be organic or conventional, the destinies of Cuba are in some rightful form and manner irrevocably linked with our own, but how, and how far, is for the future to determine in the ripeness of events. Whatever be the outcome, we must

see to it that free Cuba be a reality, not a name, a perfect entity, not a hasty experiment bearing within itself the elements of failure.

Respectfully submitted.

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Assistant Attorney-General.

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APPENDIX.

I.

JUDGE LACOMBE'S OPINION.

United States circuit court, southern district of New York.

In the matter of the application for extradition of Charles F. W. Neely.

LACOMBE, Circuit Judge.

Argument was heard on the preliminary objections on June 29, and the 23d of July was then designated for the presentation of testimony on the question of probable cause, in the event of the court's overruling such objections. That date is so near at hand that decision on the objections should be filed forthwith. Counsel have taken so long to prepare briefs—they were only received yesterday—that there is not the time to enter into any elaborate discussion of the points presented; nor indeed is any such discussion necessary. Some of the objections advanced on the oral argument appear not now to be pressed, and those still urged do not present any difficult questions.

This proceeding is brought under a recent amendment to section 5270 of the United States Revised Statutes, hereinafter referred to as the act of June 6, 1900. To

the existing provisions as to extradition it adds the following:

> Whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of the following offenses, namely: * * * (Here follows a long enumeration which includes, "embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries") * * * and who shall depart or flee, or who has departed or fled, from justice therein to the United States, any Territory thereof or to the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern proceedings authorized by this proviso: *Provided further*, That such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged: *And provided further*, That no return or surrender shall be made of any person charged with the commission of any offense of a political nature. If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order

of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial.

Under the exercise of the treaty-making power Congress has the right to provide for the return of a fugitive criminal to the foreign country from which he has fled; and, waiving any requirement of entire reciprocity from the foreign country, it may by statute, without treaty, provide for such return. This power has been exercised by the Federal Government for years without question. It is a power exercised by every sovereign State, sometimes in accordance with the provisions of a treaty, sometimes without any treaty, as a matter of international comity. The mere fact that the individual who has committed a crime in a foreign country is himself a citizen of the United States does not prevent the United States from returning him to the country against whose laws he has offended. Having voluntarily gone into the foreign country to commit his crime, he may involuntarily be returned there for trial and punishment. Nor is it any sound objection against the extradition of the criminal citizen that the courts in the country to which he is returned follow a procedure different from our own. The provisions of articles 4 and 5 of the amendments to the Constitution have no relation to the subject of extradition. (*In re Giacomo*, 12 Blatchf. C. C., 391.) He may be returned to some Latin country where conviction might follow upon hearsay testimony, or even upon vociferous declarations of belief by more or less credulous individuals; if Congress chooses to make such a treaty he may be sent to Turkey or Siam or Zanzibar, where it is safe to assume the procedure bears still less likeness to the common law. Having himself selected the forum for the commission of his crime, he will not be heard to object that the procedure of its courts is not quite what he would prefer when he comes

to stand trial. Any other rule would make this country an inviolable asylum for its citizens whenever they may return to it red handed from crimes committed abroad, for its courts can not punish for a crime committed in a foreign country.

These propositions are elementary, and nothing in the brief or in the oral argument challenges their accuracy. The principal objection advanced on behalf of the prisoner, whose identity is not disputed, is that this particular act of June 6, 1900, is unconstitutional, because it provides for extradition to a foreign country occupied by or under the control of the United States, or possibly, to state the argument more accurately, because under the Constitution the United States can not occupy or exercise control over the island of Cuba, since its inhabitants are free and independent.

The joint resolution of April 19, 1898, declared that "the people of the island of Cuba are, and of right ought to be, free and independent," and this finding as to their status may be accepted by the courts. Nevertheless, it is an historical fact of which the courts will take judicial notice that on that same day the territory of that island was occupied by Spain. Against that power we declared war. We sent our fleets and armies to the island, invaded it, joined battle with our alien enemies therein, and continued the struggle with them until throughout the length and breadth of the island our forces were in full military occupation of this foreign territory. The declaration of war was in no wise obnoxious to the Constitution, nor was the invasion, nor the conflict, nor the result. In the entire sequence of events down to the date of Spain's acquiescence in such result by the ratification of the treaty of Paris, counsel for the prisoner finds nothing to criticise as obnoxious to the Federal Constitution. On the day that treaty was signed we were indisputably in military occu-

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pation of the island. Why, under the Constitution that occupation, legitimately entered upon, may not continue to secure the lives and property of American citizens within that territory until the political branch of the Government shall be satisfied that its further continuance is unnecessary, it is difficult to conceive, and no authority cited in the brief sustains any such proposition. Reference is made to *Ex parte Milligan* (71 U. S., 2), but that case is not at all in point. There a citizen was tried by military commission, not in a foreign country, but in the State of Indiana, a portion of the United States, not at the time a part of the theater of war, with civil courts organized and in full operation, having jurisdiction to hear and determine all questions as to the offense with which he was charged. But there is no suggestion here that if remanded to Cuba Neely will be tried by a court-martial or otherwise than by a civil court, following the same procedure as that prevailing before the concession of Cuba's independence. And, indeed, if the criminal laws of the island be enforced solely by courts-martial, that circumstance would not be a sufficient answer to request for extradition; having chosen the country in which to commit the crime, he must accept the tribunals which administer its laws. Moreover, it will be noted that the act of June 6, 1900, is most careful to safeguard the party accused against unsubstantial charges of crime. It provides that before the accused is returned there shall be an inquiry before a judge of a Federal court "who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged;" if the evidence fails to establish probable cause the accused shall not be returned. This means probable cause tested by the practice of our courts, and supported by *evidence* which we would hold competent. No mere statement of an official that he has caused an examination into the facts to be made with such and

such a result is of any probative weight; nor is hearsay competent nor unverified copies of documents. There must be laid before the court sworn statements as to facts (not as to beliefs or opinions or deductions) from which the judge may reach the conclusion, despite such explanatory evidence as the accused may offer, that there is a prima facie case made out against him.

The objection that the act of June 6, 1900, is unconstitutional is unsound.

Various technical objections are urged to the sufficiency—in form—of the various documents presented, as, for instance, that a certain certificate is signed by the military governor, and not by the principal diplomatic or consular officer. And that there is no certification that certain depositions are so authenticated "as to entitle them to be received for similar purposes by the tribunals of the foreign country"—probably not material when authenticated so as to be received upon the special independent investigation to be had here under the act of 1900.

Objections of this class are not given the weight once accorded to them when the granting of a request for extradition was more jealously regarded by the courts than it is to-day. Originally it seemed to be the theory that the sole foundation of the practice rested in reciprocity; and that if some particular foreign country were backward about returning our criminals we would be keen to keep theirs. During this period courts were astute to find flaws in certificates, jurats, seals, and signatures as an excuse for refusing the request of some demanding government. At last, however, it seems to have been discovered that the thief, the ruffian, and the forger was not a particularly valuable acquisition; and that although it might be highly desirable that offenders against our laws should be brought back here and tried as a deterrent example, it was possibly more important

that this country should not be made a city of refuge for foreign criminals, and that an enlightened public policy would be astute to return them, once we were satisfied that they were criminals. The expression of this public policy is found in the provisions of the act of Congress which excludes convicted criminals whose offenses are not political, with those afflicted with contagious diseases, and such as are liable to become a public charge. Since then there has not been so much hypercriticism in dealing with objections as to form, and if the certificates, signatures, et cetera, are in substantial conformity to the requirements of the statute and give reasonable assurance of authenticity it is sufficient. Such seems to be the case here and the documents are admitted for what they may be worth. Some of them are mere declarations of opinion, containing no relevant facts; their effect, however, will not now be discussed.

Upon the oral argument some question was made as to whether article 401 of the Penal Code of Cuba and Porto Rico, or sections 37 and 55 of the Postal Code were in force in Cuba at the time of Neely's alleged offense. It is assumed from the circumstance that this point is not discussed in the briefs that counsel acquiesce in the suggestion made by the court upon the argument that the question now to be determined is whether there is probable cause that the prisoner committed the offense enumerated in the act of June 6, 1900. If that be shown, it may be left to the trial court to decide which specific provision of these codes was in force and violated. The description of offense in either code is clearly within the broad language of the act of June 6, 1900.

Counsel have discussed the evidence; this is premature, and will not be considered by the court until after the hearing on July 23, when further proofs may be adduced. It will be sufficient now to indicate that the mere presentation of an indictment or its equivalent can

not be held sufficient under this act. The court is to find probable cause *on evidence;* witnesses need not be brought from Cuba to testify here, but their sworn statements can certainly be obtained so that the court's conclusion may be based upon competent proof of facts within the knowledge of the witnesses.

The preliminary objections are overruled. The hearing on July 23 is fixed for 1.30 p. m.

July 18, 1900.

Henry L. Burnett, United States attorney, for the United States.

John D. Lindsay, for the accused.

II.

OPINION OF JUDGE DUGGAN OF LOUISIANA.

STATE OF LOUISIANA *v.* WILLIAM A. COX. } No. 925. First City Criminal Court.

Charge: "Being a fugitive from justice."

William A. Cox, the accused herein, is detained under a capias of this court, issued upon the affidavit of R. B. Stubbs, a member of the police department of this city, charging the said Cox with having committed the crime of grand larceny in the city of Habana, isle of Cuba, and being a fugitive from justice, all in violation of section 1038 of the Revised Statutes of this State. Counsel for the accused filed in this court a plea demurring to its jurisdiction and setting forth the grounds specifically, to wit:

(1) "That he is held under section 1038 of the Revised Statutes of this State, which statute only authorizes the detention of fugitives from a State or Territory of this Union.

(2) "That the affidavit made in pursuance of this statute alleges that he, the said W. A. Cox, committed the crime of grand larceny in the island of Cuba, which aforesaid island of Cuba is not, and never has been, either a State or Territory of the United States.

(3) "That there exists no treaty between the United States and the island of Cuba, and there can be no extraditable offense without a treaty.

(4) "That this honorable court, the courts of this or of the United States, possess no extraterritorial jurisdiction.

(5) "That no executive officer of this State or of the the United States possesses any power, discretional or otherwise, to deliver fugitives from foreign nations without a treaty."

(1) Section 1038 of the Revised Statutes of this State reads as follows:

> When any person shall be charged on oath of any creditable person, before any judge or justice of the peace of this State, with having committed any crime within any State or Territory of the United States, and has fled from justice, it shall be the duty of such judge or justice to issue his warrant for the arrest of such accused, and to proceed to the examination of such case and commit or discharge the accused, as such judge or justice may determine, provided no person so accused shall be detained in custody exceeding ninety days.

Counsel is in error in quoting the article to read "from a State or Territory of this Union," when, in fact, it should read "within any State or Territory of the United States." The difference is apparent, and stress is laid by counsel on the fact that Cuba is without the territorial limits of the United States. It is not at all necessary that before the sovereignty of the United States can be exercised the territory must be embraced in this Union.

During the war between the United States and Mexico the port of Tampico, in the Mexican State of Tamaulipas, was conquered, and possession of it held by the military authorities of the United States, acting under orders of the President. The port of Tampico * * * and the Mexican State of Tamaulipas, in which it is situated, were undoubtedly at the time * * * subject to the sovereignty and dominion of the United States. It did not thereby become a part of the Union. The boundaries of the United States were not extended by the conquest. (*Fleming et al.* v. *Page*, 9th Howard (U. S.), p. 603.)

A territory is defined by Bouvier as "a part of the country separate from the rest and subject to a particular jurisdiction. In the sense it is used in the Constitution of the United States it signifies a portion of the country, subject to and belonging to the United States, which is not within the boundary of the United States."

Another well-known authority defines it to be "A portion of land over which a country exercises sovereignty and dominion."

(2) Is the island of Cuba a territory within the meaning of the article 1038 of the Revised Statutes of this State?

Previous to the declaration of war between the United States and Spain the island of Cuba belonged to and was under the sovereignty of Spain. The United States, shortly after the opening of hostilities, landed troops in said island of Cuba, and as a result of the memorable charge at San Juan the Spanish surrendered and the military authorities of the United States were left in undisputed possession.

On December 10, 1898, commissioners appointed by the United States and Spain entered into a treaty of

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peace, which was ratified by the Senate of the United States on January 5, 1899. Article 1 of the said treaty reads as follows:

> Spain relinquishes all claim of sovereignty over and title to Cuba. And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may, under international law, result from the fact of its occupation, for the protection of life and property.

Article 11 of the said treaty of peace recites:

> The Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignty shall be subject, in matters civil as well as criminal, to the jurisd[illegible] of the country wherein they reside, pursuant to the [illegible]linary laws governing the same; and they shall have the right to appear before such courts and to pursue the same course as citizens of the country to which the courts belong.

Article 16 of the said treaty recites:

> It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof, but it will, upon the termination of such occupancy, advise any government established in the island to assume the same obligations.

The isle of Cuba is at the present time in actual possession of the authorities of the United States; the agents of the United States are governing its affairs and collecting and disbursing its public moneys, appointing and removing the judges of its courts, and, in fine, is exercising the prerogatives and control over the isle of Cuba

in the same degree as that exercised by it over territories within its boundaries. Its public officials, including the judiciary, have taken the oath of allegiance and obedience to the sovereignty of the United States, and the flag of the United States proclaims to the world its sovereignty and dominion. The machinery of the various departments of the civil government is in operation, and a military governor is exercising the duties of his office. A somewhat similar condition of affairs occurred at the time of the occupation of Tampico, Mexico, by the military forces of the United States. Justice was administered by courts appointed under the military authority, General Kearny, commanding the expedition to New Mexico and California, was instructed by the Secretary of War "to observe the same course of conduct in the departments that might be conquered by him, provide for the establishment of temporary civil governments, recommend the employment of such of the existing civil officers as were known to be friendly to the United States and would take the oath of allegiance to them," and authorized him to "assure the people of these provinces of the wish and design of the United States to provide for them a free government with the least possible delay, similar to that which exists in our Territories."

Hon. James Buchanan, Secretary of State, in a dispatch to Mr. Voorhees on October 7, 1848, writing on the conditions then existing in California, said:

> The President in his annual message, at the commencement of the next session, will recommend all these measures to Congress in the strongest terms, and will use every effort, consistent with his duty, to insure their accomplishment. In the meantime the condition of the people of California is anomalous, and will require, on their part, the exercise of great prudence and discretion. By the conclusion of the treaty of peace the military government

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which was established over them under the laws of war, as recognized by the practice of all civilized nations, has ceased to derive its authority from its source of power. But is there, for this reason, no government in California? Are life, liberty, and property under the protection of no existing authorities? This would be a singular phenomenon in the face of the world, and especially among American citizens, distinguished as they are above all other people for their law-abiding character. Fortunately they are not reduced to this sad condition. The termination of the war left an existing government, a government de facto, in full operation, and this will continue, with the presumed consent of the people, until Congress shall provide for them a territorial government. The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the domain of the strongest.

Referring to the above, the Supreme Court of the United States, in *Cross et als.* v. *Harrison* (16 Howard, U. S., p. 190), said:

> No one can doubt that these orders of the President and the action of our army and navy commander in California in conformity with them was according to the laws of arms and the right of conquest, or that they were operative until ratification and exchange of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations. In this instance it is recognized by the treaty itself.

It has been stated that we are not informed that the laws of Cuba provide a penalty against grand larceny. This court can take judicial notice of the fact that there was in the laws of Cuba, under the sovereignty of Spain, a statute denouncing the crime of grand larceny and prescribing its penalty—articles 384–502 and article 589 of the law of criminal procedure. The same articles are in full force and effect at the present time. "The laws and government in force at the time of conquest remain in force until altered by the conqueror." (*Hawkins* v. *Filkins*, art. 24, p. 286.) "All the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in full force until altered by the Government of the United States." *American Insurance Co. et al.* v. *Canter*, 1 Peters (U. S.), 511.)

> During the civil war, when any portion of the Southern States was in the occupation of the forces of the United States, the municipal laws, if not suspended or superseded, were generally administered there by the ordinary tribunals for the protection and benefit of persons not in the military service. (*Dow* v. *Johnson*, 100 U. S., p. 158.)

In re Thirty Hogsheads of Sugar v. *Boyle et als.* (9 Cranch U. S., 191), the court said: "The possession of the soil impresses upon the owner the character of the country." Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of

Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark. It might, therefore with certainty be said that the island of Cuba, after its capitulation, remained an island of the United States, until restored to her people.

The treaty of peace binds the United States to occupy the island, and to discharge the obligations resulting from such occupancy, for the protection of life and property. It is given to the Spaniards the right to appear before the courts and has subjected them in matters civil and criminal to the jurisdiction of the country wherein they reside, pursuant to the ordinary laws governing the same, and it will, after its occupancy, advise any government to assume the same obligations. These obligations are sacred to an oppressed people, and the faith of the United States is pledged to their fulfillment. It would be indeed a strange anomaly if a citizen of the United States could with impunity rob and plunder the people of Cuba and receive justification at the hands of the courts within the United States, under the plea that Cuba is not a part of the United States. This court can not from patriotic or political motives determine the matter. If the laws of this State were not framed to meet the exigencies of a case like the present one the fault could only be attributable to Congress, which in its anxiety and eagerness to inject foreign complications and situations into our present form of government, has negligently forgotten to provide the means of enforcing obligations assumed by it to the people of the island of Cuba.

The court is of the opinion that the use of the word "territory" in the section of the Revised Statutes referred to herein is intended to embrace any portion of land over which the United States exercises control, sovereignty, dominion, and occupation. These essentials are all found in the existing conditions, and Cuba is unquestionably a Territory within the intention of our law.

(3) (4) (5). The court will not pass upon these objections for the reason that the subject-matter does not come within its jurisdiction. It is, therefore, ordered that the demurrer herein filed be overruled; and it is further ordered that the accused stand committed.

(Signed) T. J. DUGGAN,
Judge First City Criminal Court.

I hereby certify that the above is a correct copy of the original decision handed down in open court on Saturday, September 9, 1899, by the Hon. T. J. Duggan, judge, in the above numbered and entitled cause.

CHAS. F. BYRNE,
Stenographer and Deputy Clerk.

NEW ORLEANS, La., *March 28, 1900.*

III.

THE ARGUELLES CASE.

The facts in this case were that on April 5, 1864, the minister of Spain addressed a note to the Secretary of State, informing him that one Jose Arguelles had escaped from the island of Cuba under the charge of having sold into slavery a large number of recaptured African slaves, and had taken refuge in New York. The minister therefore asked that Arguelles might be delivered up to the Government of Spain, "not upon the ground of a right to demand it, but as an act of comity in the interest of justice and humanity." (Letter of Secretary Seward to chairman of the Committee on the Judiciary, House of Representatives, Diplomatic Correspondence, 1864, part 4, p. 37.) By direction of the President, Arguelles was seized in New York and delivered to the Spanish authorities for trial in Habana. When this became known a

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resolution was introduced in the House of Representatives, condemning the action of the Executive. Mr. Seward defended his course in a lengthy and forcible communication addressed to the chairman of the Committee on the Judiciary, to which reference will presently be made. Once again the legislative branch of the Government affirmed the present contention of the Government, for as in the case of Robbins, when the House, by a large majority, accepted the view of Marshall as to President Adams's power, so in the Arguelles case the House accepted the contention of Secretary Seward and defeated the resolution of censure. In the Senate a resolution was adopted requesting information, and on June 1, 1864, President Lincoln transmitted to the Senate Secretary Seward's report, which said:

> There being no treaty of extradition between the United States and Spain, nor any act of Congress directing how fugitives from justice in Spanish dominions shall be delivered up, the extradition in the case referred to in the resolution of the Senate is understood by this Department to have been made in virtue of the law of nations and the Constitution of the United States. Although there is a conflict of authorities concerning the expediency of exercising comity toward a foreign government by surrendering, at its request, one of its own subjects charged with the commission of crime within its territory, and although it may be conceded that there is no national obligation to make such a surrender on a demand therefor, unless it is acknowledged by treaty or by statute law, yet a nation is never bound to furnish asylum to dangerous criminals who are offenders against the human race; and it is believed that if, in any case, the comity could with propriety be practiced, the one which is understood to have

called forth the resolution furnished a just occasion for its exercise.

Secretary Seward's communication to the House of Representatives constitutes a powerful argument for the power of the Executive to extradite in the absence of either treaty or Congressional enactment. It is as strong in reason as it is eloquent in diction. It bears with striking force upon the present contention, for, if the executive department of the Government may extradite as an act of sovereign power, independent of treaty or statutory enactment, *a fortiori* it can extradite when authorized, empowered, and directed by Congress so to do.

Mr. Seward reviews the opinions of learned writers on international law and the decisions of the courts, to which reference has already been made in this brief. He concludes that "upon the plainest reason and a uniform concurrence of authority, that the United States, in its relations to foreign nations, certainly possesses the authority to surrender to the pursuing justice of a foreign state a fugitive criminal found within our territory."

As to the alleged right of asylum in this country in the absence of treaty regulations for extradition, Mr. Seward's reasoning is especially forcible. He says:

> That the practice of civilized nations, and especially of this country, has maintained this privilege of asylum, and that this nation at least would consider its honor engaged to vindicate it, no one will be disposed to deny. This privilege is understood to embrace refugees from personal oppression and from the consequences of political offenses. But no civilized nation, and our own as little as any, has included within this privilege criminals guilty of crimes proscribed by nature and humanity. In these cases, to afford protection against pursuing justice is an offense against humanity and against our own society. Mr. Wirt, in a passage already quoted,

> draws the distinction with force and precision. In speaking of the case of the criminals before him, he says their surrender "would violate no claim which these fugitives have on us. Humanity requires us to afford an asylum to the unfortunate, but not to furnish a place of refuge to the guilty. On the other hand, respect for ourselves and a prudent regard for the purity of our society admonish us to repel rather than invite the admixture of foreign turpitude and contamination."

Mr. Seward concludes his forcible vindication of his position by saying:

> Upon these considerations, then, it would seem that the action of the President of the United States, in directing the extradition of Arguelles upon the application of the Government of Spain, was in pursuance of a national authority, sanctioned by the law of nations; was in exercise of an executive function belonging to his office under the Constitution; was not in derogation of any right of asylum; was a just recognition of our relations with a friendly power; was conformed to the cherished policy of this country for the extinction of the traffic in slaves, and was an obligation to justice and humanity which could not have been withheld.

All of which might with almost equal propriety be applied to the case at bar.

IV.

THE CUBAN CRIMINAL CODE.

In order that there may be no misapprehension by the court as to the nature of the criminal tribunals now sitting in Cuba and the methods employed therein, it may

be well to ascertain from authoritative sources the exact nature of these tribunals.

Dr. Walton, whose work on The Civil Law in Spain and Spanish America is an authority, and who has exceptional capacity to treat the subject, thus describes the Spanish criminal code as it existed prior to the occupation by the United States:

> The assertions often made by ignorant people that under the old Spanish or Roman system the proceedings are secret, and that the accused does not know who are his accusers or what the witnesses have testified against him, is incorrect, misleading, and one which has caused Spanish-American countries much trouble when United States citizens have been concerned.
>
> Little difficulty is caused by the minor offenses or misdemeanors which are tried before the lowest courts held by municipal judges and from which appeals lie to the higher courts, in a manner similar to the common-law system, hence such cases may be eliminated.
>
> In the more serious criminal offenses every criminal trial is divided into two stages—the summary or preliminary investigation (*sumario*), carried on under the old Spanish system, usually by a judge of the first instance, a *fiscal* or public attorney, and an *escribano* or clerk, who immediately repair to the spot of the crime and begin a thorough *ex parte* investigation. The testimony of the accused is often taken down without his knowing with what crime he is charged or who the witnesses against him are; and during this stage the accused is kept in solitary confinement so that he can not connive any scheme which might defeat the ends of justice, and while in such confinement he is called *incommunicado*.[1]

[1] Abolished since our occupation.

Under the Spanish constitution (see articles 4 and 5) a person can not be detained but for just cause, and solitary confinement is limited. These provisions can be exercised similarly to a writ of *habeas corpus*.

The summary or preliminary proceedings correspond to the secret investigation of a grand jury in the United States who listen to such testimony as is offered or is deemed sufficient without permitting the accused to be present or to know what transpires, and, if, in their judgment, there is sufficient ground, an indictment is found, and thereafter a trial begins in public court.

This is not unlike the civil-law system in which the judge of the first instance, the public attorney, and clerk constitute a grand jury, and if there is no case made out the prisoner is given his liberty; should a *prima facie* showing be made against the accused he is released from solitary and committed to ordinary confinement.

The trial does not take place before the judge who has conducted the investigation (as is often erroneously stated), but this judge refers the whole record of proceedings to the criminal branch of the next higher court or *audiencia* for a public trial, where the prisoner is faced with his accuser and witnesses and is provided with a competent attorney to defend him.

In the Spanish-American countries testimony is taken down in writing, and, after being read to the witness, is signed by him and by the judge, in order to prove that his statements have been correctly recorded.

This gives a degree of certainty to the correctness of the testimony which can not be obtained by a stenographic report, and it renders it impossible for

the judge or opposing counsel to record language different from that actually used.

When the summary is ended all the testimony is presented to the accused for his examination, and the right is then given him to cross-examine the witnesses who have appeared against him.

The cross-examination is an old Spanish proceeding, called *careo*, which means that the accused is personally confronted with the witnesses in presence of the judge, for the purpose of cross-examining them. It is, therefore, quite incorrect to assert that because the *sumario*, or first stage under the Latin system, is kept secret, the accused does not know anything regarding the evidence against him; the fact being that during the second or plenary stage of the proceeding he is fully informed of all that has been done and is given an opportunity to refute it, either by presenting his own witnesses or by cross-examining such as have been presented by the other side or have been called by the judge.

It should not be difficult to see which system of criminal jurisprudence is best calculated to do justice by ascertaining the real facts of the case, whether by a judge of long experience and proficiency in his profession and with no personal interest in the case tried before him, or by a jury composed of men who have had no experience in criminal jurisprudence. If the judge may sometimes be derelict in his duties, so may the jury sometimes be controlled by their emotions or prejudices. If the judge fails to do justice, his failure may be corrected by an appellate court, as all cases must be reviewed upon appeal.

The common-law criminal jurisprudence is founded upon the principle that it is better to let one hundred criminals go unpunished than to inflict punishment upon one innocent person. While the

> Spanish system accepts that humanitarian principle, it is nevertheless better calculated to prevent the escape of a criminal unpunished.

When the United States took possession of Cuba its first work was to reconstruct both the personnel and methods of the civil and criminal courts of that island. Counsel for the appellant has had much to say with reference to the abuses in the Spanish judicial system which prevailed prior to the war of liberation, but he has neglected to inform the court that all of these abuses have been swept away and that the civil procedure has been reformed so that it may challenge favorable comparison with our own.

In his first order, dated January 1, 1899, the military governor of Cuba provided that—

> The civil and criminal code which prevailed prior to the relinquishment of Spanish sovereignty will remain in force, with such modifications and changes as may from time to time be found necessary in the interest of good government.

On January 12, 1899, the military governor created a "department of justice and public instruction," and appointed a learned Cuban, one José Antonio Gonzalez Lanuza, to be its secretary.

As the treaty of Paris had severed the connection between the local courts of Cuba and the appellate court in Spain, the military governor, on April 14, 1899, constituted a supreme court, composed of Cuban lawyers and vested with full appellate jurisdiction. (See Order 41, Civil Report of Major-General Brooke, p. 34.)

By order dated June 15, 1899, the criminal courts, namely, the audiencias, were organized. The full order constituting them will be found in Brooke's Civil Report, page 49. The material portions of the order are as follows:

I. Hereafter the audiencias of the island shall be

organized and shall exercise jurisdiction in accordance with the provisions of the present order.

II. There shall be six audiencias in the island, viz, Pinar del Rio, Habana, Matanzas, Santa Clara, Puerto Principe, and Santiago de Cuba. Each of these audiencias shall exercise civil and criminal jurisdiction within the limits of the above-mentioned provinces, respectively. The jurisdiction of the audiencia of Habana shall extend also to administrative matters (contencioso administrativo).

The chief defects in the criminal code of Cuba as it had existed prior to the war were, in the first place, the incomunicación, whereby on arrest a man was confined and restrained from communication with his friends until a preliminary investigation was made as to his guilt; second, the payment of judges by fees, which was an invitation to corruption; and, third, the personnel of the courts as they then existed. These and other abuses were at once remedied by order 109, dated July 13, 1899. (See Brooke's Civil Report, p. 71.) Cuban lawyers of approved learning and integrity were selected and appointed as judges of these courts. They were compensated by fixed salaries and all fees were abolished, and the method of arresting, arraigning, indicting, and trying a man was changed so that it would conform to Anglo-Saxon ideas. Thus the incomunicación was abolished, and a defendant was given the right upon arrest to be brought before the committing magistrate to be informed of what he was accused, and by whom, and given reasonable time and opportunity to select an attorney to defend him. Moreover, the right previously existing to compel a defendant to testify against himself was abolished, and, in accordance with our methods, it was made optional with him either to testify or be silent. The publicity of all criminal proceedings was likewise insured, the right of appeal provided to an appellate court in case of error, and a right

to release on bail was also provided. This order reconstructing the Cuban criminal code is too long to be stated at length, but will be found in Brooke's Civil Report, pages 71, 72, 73, and 74.

It is impossible to describe at length or with any completeness the present constitution of these courts and the methods of legal procedure. All of the judges are Cuban lawyers and civilians, and none of them are officers of the United States Army. Their names will be found in the various orders appointing them. (Brooke's Civil Report, pp. 104–126.)

The court which preliminarily investigated the charges against Neely is called the court of the first instance, and is analogous to our grand jury. It has already indicted Neely. The court which will try Neely, if he be extradited, is the so-called "audiencia de lo criminal," a court of record, possessing full jurisdiction of criminal offenses. (See appellant's brief, pp. 76 and 77.)

From the audiencia an appeal lies to the supreme court of Cuba.

The abuses which existed prior to the occupation of Cuba by the United States must not be confused with the present condition of affairs with respect to the administration of justice. There is no testimony before this court which would justify it in assuming that if Neely be extradited he will not secure a fair trial in Cuba. The suggestion that he will not is wholly an assumption of appellant's counsel and is based upon what *was* rather than what *is*. In any event, the question as to whether extradition should be made in view of the present judicial system of Cuba is a question for the executive branch of the Government. If, after Neely is finally held for extradition, the President is satisfied that he could not receive a fair trial, it is to be presumed that the extradition would not be authorized by the Executive. Moreover, if Neely be extradited and should not receive a fair trial by the local

civil tribunals of Cuba, it is within the power of the United States to annul any decision of the local courts which shall do Neely an injustice. This court need only recognize the existence of civil courts in Cuba, and assume in this, as in any other extradition case, that the civil courts of the demanding country will do justice.

V.

THE PRESIDENT'S MESSAGE OF DECEMBER 3, 1900.

The following may be quoted from the President's message of December 3, 1900, as showing that the Executive has not recognized any Cuban *government* as now in existence:

> On the 25th of July, 1900, I directed that a call be issued for an election in Cuba for members of a constitutional convention to frame a constitution as a basis for a stable and independent government in the island. In pursuance thereof the military governor issued the following instructions:
>
> Whereas the Congress of the United States, by its joint resolution of April 20, 1898, declared—
>
> "That the people of the island of Cuba are, and of right ought to be, free and independent.
>
> "That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island, except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people."
>
> And whereas the people of Cuba have established municipal governments, deriving their authority from the suffrages of the people given under just

and equal laws, and are now ready, in like manner, to proceed to the establishment of a general government which shall assume and exercise sovereignty, jurisdiction, and control over the island:

Therefore, it is ordered that a general election be held in the island of Cuba on the third Saturday of September, in the year nineteen hundred, to elect delegates to a convention to meet in the city of Habana at twelve o'clock noon on the first Monday of November, in the year nineteen hundred, to frame and adopt a constitution for the people of Cuba, and as a part thereof to provide for and agree with the Government of the United States upon the relations to exist between that Government and the government of Cuba, and to provide for the election by the people of officers under such constitution, and the transfer of government to the officers so elected.

The election will be held in the several voting precincts of the island, under and pursuant to the provisions of the electoral law of April 18, 1900, and the amendments thereof.

The election was held on the 15th of September, and the convention assembled on the 5th of November, 1900, and is now in session.

After describing the proceedings at the opening of this constitutional convention, the President concludes this portion of his message as follows:

When the convention concludes its labors, I will transmit to the Congress the constitution as framed by the convention for its consideration and for such action as it may deem advisable.

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In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES F. W. NEELY, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES marshal for the southern district of New York.

Nos. 387 and 406.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

We ask the indulgence of the court in submitting in reply to the supplemental brief for the appellant a short reply:

I.

We wish, in the first place, to correct two inadvertent errors in our own brief. The first is on page 62, when we said, in stating the facts of *Cross* v. *Harrison* (16 How., 164), that "the duties under the war tariff were collected

from the ratification of the treaty to the day that the collector entered upon his duties." This is an error. The duties under the war tariff were collected by the military governor from the ratification of the treaty until the receipt in California of official notice of such ratification. Thereafter the military governor continued to exact duties on imports, but charged the rate then provided by the general revenue laws of the United States upon imports. The error does not affect the value of the authority, because this court held that the war duties were properly exacted from the date of the treaty, which was February 3, 1848, until August 7, 1848, when, upon receipt of official advices as to the ratification of the treaty, the military governor announced the cession of California to the United States. It is also to be observed that while the military governor did change the rates of duties so that they would accord with those imposed by the general revenue laws, yet these duties were exacted, not by any civil officer of the United States, but by the military governor, whose government, under the law of belligerent right, was maintained until California had been admitted into the Union; and, as has been said, this court affirmed the propriety of this course.

In this connection we also wish to call attention to the case of *Thirty Hogsheads of Sugar* v. *Boyle* (9 Cranch, 191). This was an appeal from the decree of the circuit court of Maryland condemning 30 hogsheads of sugar, the property of the claimant, a Danish subject, the sugar being the product of his plantation in Santa Cruz, and shipped, after the capture of that island by the British, to a house in London for the account of the claimant.

Santa Cruz had capitulated to the English forces, and during the period of possession, and during our war of 1812, the sugar was captured. Chief Justice Marshall delivered the opinion of the court and sustained the validity of the seizure. He said:

> Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet, to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark.

Similarly we argue that our right to govern Cuba under the law of belligerent right remains as long as this Government is in possession of it and until we shall see fit to surrender it.

The second error will be found on page 81 of our brief, where, in discussing the case of *Callan* v. *Wilson*, we say that Congress "expressly made the Constitution applicable to the State of Maryland." "State of Maryland" should read "District of Columbia."

II.

In the supplemental brief the learned counsel for appellant radically changes the nature of his contention. He now claims that the act of June 6, 1900, is in effect a treaty, and, for this reason, invalid. If it is a treaty,

its validity can not be questioned on the ground hitherto suggested by the appellant, that it is legislation for another country, for all treaties necessarily carry with them consequences which affect both of the contracting powers. In the nature of things, they have an extraterritorial application. If, therefore, the act of June 6, 1900, is a treaty, as the appellant now argues, his entire argument as outlined in his main brief necessarily falls.

He, however, suggests that it is void because it has not been ratified in the constitutional manner. We broadly challenge the assertion that this act of Congress can in any wise be regarded as a treaty. A treaty is "a formal agreement or compact, duly concluded and ratified between two or more nations." (See Standard Dictionary.) It must not only be a treaty in form, but it must be between two nations. There is no such thing as a unilateral treaty; it is an impossibility. Applying this to the act of June 6, 1900, we ask: With what nation have we executed this treaty? Upon what nation does it confer rights or impose obligations? It can not be a treaty with the republic of Cuba, for the existence of no such republic has been officially recognized. But even if there were such a republic, when did it assent to the treaty? Where was it signed? Where were the ratifications exchanged? The statement of the proposition carries with it its refutation. The appellant's learned counsel says that this act "certainly is the assumption of a relation toward a foreign government." What foreign government? In any event there are many assumptions of relations to foreign governments which in no sense are treaties. The

President receives an ambassador, and thereby assumes a relation to a foreign government. Is such reception treaty? Congress passes an act to establish consular courts. Is such act a treaty? If an extradition statute is a treaty, then every extradition statute from the beginning of the Government has been absolutely void. In all the intercourse between sovereign nations it has never been suggested by any diplomat, statesman, judge, or text writer that an extradition statute is a treaty until the learned counsel suggests it in the case at bar.

The two cases cited of *Holmes* v. *Jennison* (14 Pet., 540) and *People* v. *Curtis* (50 N. Y., 321) are not in point. They merely rule that, as between the States of the Union and the Federal Government, the matter of extradition is wholly for the Federal Government, and that the States can not therefore by statute provide for the extradition of fugitive criminals.

III.

The effort of appellant's counsel to avoid the force of the reasoning in the *Ross Case* (140 U. S., 453) seems to us without result. He argues (supplemental brief, p. 18) that the decision of this court was not placed upon the ground that the United States could "exercise the jurisdiction or enforce the laws of the United States" in such consular courts, but was on the ground that, by immemorial usage, the treaty-making power had authority to accept "an authority in another country."

This seems to us a distinction without a difference, for, in the Ross case, as in the case at bar, the question was

the validity of acts of Congress in other countries. Of course, in both cases the right to legislate must be due either to the law of belligerent right, or to some authority conferred by treaty, or to the immemorial usage of nations. In the Ross case the right to legislate for a consular tribunal in Japan was sustained, not only because of the treaty between Japan and the United States, which permitted us to administer justice and execute our laws upon Japanese territory, but also because of the usage of nations with respect to the maintenance of such tribunals "in other than Christian countries." As this court showed, this right had been recognized by "a long and uniform acquiescence by the executive, administrative, and legislative departments of the Government in the validity of the legislation." Similarly, in the case at bar, the right to legislate for a country which we are occupying under the law of belligerent right exists by the usage of nations, and is further confirmed by the treaty of Paris, which confirmed our possession of Cuba and imposed upon us the obligation of governing it until such time as we deem it wise to relinquish such possession. The duty of government must carry with it the necessary power and authority to provide legislation, and the point of the Ross case is that such portions of the Constitution as are applicable to the recognized courts within the acknowledged boundaries of the United States have no application to courts or countries where we exercise jurisdiction, which, in a certain sense, is extraconstitutional, although it is attributable to the war-making and treaty-making powers conferred by the Constitution upon the President and Congress.

IV.

The main premise from which appellant's counsel makes his deduction as to the constitutionality of the act of June 6, 1900, is the assertion that the joint resolution of April 20, 1898, was a recognition of the existence of the Cuban republic. We have already pointed out the fact that the proviso providing for such recognition was stricken out by Congress, which thus affirmatively refused to accord it. A reference to the debates in Congress will make this perfectly plain. In the special message of the President of April 11, 1898, which preceded the action of Congress, the President at some length argued against the recognition of the Cuban republic. He quoted from President Jackson's message of December 21, 1836, in which that President had advised against the recognition of the Republic of Texas, and also referred to the similar refusal of President Grant, who, in 1875, "after seven years of sanguinary, destructive, and cruel hostilities in Cuba," "reached the conclusion that the recognition of the independence of Cuba was impracticable and indefensible; and that the recognition of belligerence was not warranted by the facts according to the tests of public law." President McKinley then referred to his previous annual message of December, 1897, in which he had advised against the recognition of the alleged republic of Cuba. Continuing, President McKinley says, in his special message of April 11, 1898:

> These are the words of the resolute and patriotic Jackson. They are evidence that the United States, in addition to the test imposed by public law as the

condition of the recognition of independence by a mutual state (to wit, that the revolted state shall "constitute in fact a body politic, having a government in substance as well as in name, possessed of the elements of stability," and forming de facto, "if left to itself, a state among the nations, reasonably capable of discharging the duties of a state"), has imposed for its own government in dealing with cases like these the further condition that recognition of independent statehood is not due to a revolted dependency until the danger of its being again subjugated by the parent state has entirely passed away.

This extreme test was, in fact, applied in the case of Texas. The Congress to whom President Jackson referred the question as one "probably leading to war," and therefore a proper subject for "a previous understanding with that body by whom war can alone be declared and by whom all these provisions for sustaining its perils must be furnished," left the matter of the recognition of Texas to the discretion of the Executive, providing merely for the sending of a diplomatic agent when the President shall be satisfied that the Republic of Texas has become "an independent State." It was so recognized by President Van Buren, who commissioned a chargé d'affaires March 7, 1837, after Mexico had abandoned an attempt to reconquer the Texan territory, and when there was at the time no bona fide conquest going on between the insurgent province and its former sovereign.

I said in my message of December last: "It is to be seriously considered whether the Cuban insurrection possesses beyond dispute the attributes of Statehood, which alone can demand the recognition of belligerency in its favor." The same requirement must certainly be no less seriously considered

when the graver issues of recognizing independence is in question, for no less positive test can be applied to the greater act than to the lesser; while, on the other hand, the influences and consequences of the struggle upon the internal policy of the State, which form important factors when the recognition of belligerency is concerned, are secondary, if not rightly eliminable, factors when the real question is whether the community claim recognition is or is not independent beyond peradventure.

Nor from the standpoint of expediency do I think it would be wise or prudent for this Government to recognize at the present time the independence of the so-called Cuban Republic. Such recognition is not necessary in order to enable the United States to intervene and pacify the islands. To commit this country now to the recognition of any particular government in Cuba might subject us to embarrassing conditions of international obligation toward the organization so recognized. In case of intervention our conduct would be subject to the approval or disapproval of such government. We would be required to submit to its direction and to assume to it the mere relation of a friendly ally.

When it shall appear hereafter that there is within the island a government capable of performing the duties and discharging the functions of a separate nation, and having, as a matter of fact, the proper forms and attribute of nationality, such government can be promptly and readily recognized, and the relations and interests of the United States with such nation adjusted.

Thereupon a prolonged, and to some extent acrimonious, debate took place both in the Senate and in the House, in which the principal point at issue was the

justice and wisdom of acknowledging the independence of the republic of Cuba. The majority in the Senate and House, following the recommendation of the President, advised against such recognition, but there was in both Houses a determined minority, who insisted upon the recognition being inserted in the joint resolution for intervention. The Senate struck out the proviso providing for such recognition, but in the House of Representatives the majority report of the Committee on Foreign Affairs, which excluded such recognition, was defeated, and an amendment inserted which provided for such recognition. The resolution then went into a conference which was the subject of at least two reports to the Senate and the House, neither of which body would recede from its position, until on April 18, 1898, the House receded and the joint resolution was passed without the recognition of the alleged Cuban republic. (See Congressional Record, Fifty-fifth Congress, second session, pp. 3810, 3813, 3820, 3847, 3988, 3993, 4017, 4027, 4033, 4037, 4039, 4041, 4043, 4060, 4061, 4062, 4064, 4066, 4085, 4112.)

The history of the legislation, therefore, shows that the exclusion of the clause recognizing the Cuban republic was not a mere legislative inadvertence, or without meaning. On the contrary, as has been said, the matter was the subject of extended debate and decisive action, and the language of the joint resolution must be read in the light of its history. So considered, it is clear that Congress, far from recognizing the existence of a Cuban republic, deliberately and affirmatively refused to recognize it.

V.

The appellant finally argues that if Cuba be not foreign territory, the act of June 6, 1900, does not apply, notwithstanding his previous demonstration of the fact that the act was passed with the incidental purpose of extraditing the appellant. It is enough to say that we have not said that Cuba is not foreign territory. We have said that the act of Congress correctly describes it as foreign territory, which is at present occupied and controlled by the United States under the war-making and treaty-making power.

Respectfully submitted.

JAMES M. BECK,
Assistant Attorney-General.

O

Supreme Court of the United States.

No. 387.—October Term, 1900.

Charles F. W. Neely, Appellant, vs. William Henkel, United States Marshal for the Southern District of New York. } Appeal from the Circuit Court of the United States for the Southern District of New York.

[January 14th 1901.]

Mr. Justice Harlan delivered the opinion of the Court.

By section 5270 of the Revised Statutes of the United States it is provided:

"Whenever there is *a treaty or convention for extradition* between the Government of the United States and any *foreign* government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

This section was amended by Congress June 6th 1900 by adding thereto the following proviso:

"*Provided*, That whenever any *foreign* country *or territory*, or any part thereof, *is occupied by or under the control of the United States*, any person who shall violate, or who has violated, the criminal laws *in force therein*, by the commission of any of the following offenses, namely: Murder, and assault with intent to commit murder; counterfeiting or altering money; counterfeiting certificates or coupons of public indebtedness, bank notes, or

other instruments of public credit, and the utterance or circulation of the same; forgery or altering, and uttering what is forged or altered; *embezzlement or criminal malversation of the public funds, committed by public officers, employees or depositaries;* larceny or embezzlement of an amount not less than one hundred dollars in value, burglary, defined to be the breaking and entering by night time into the house of another person with intent to commit a felony therein, and the act of breaking and entering the house or building of another, whether in the day or night time, with the intent to commit a felony therein; the act of entering or of breaking and entering the offices of the Government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein; perjury or the subornation of perjury; rape; arson; piracy by the law of nations; murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government; malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices or other buildings, when the act endangers human life, *and who shall depart or flee, or who has departed or fled, from justice therein to the United States, or to any Territory thereof, or to the District of Columbia,* shall, when found therein, be liable to arrest and detention by the authorities of the United States, and *on the written request or requisition of the military governor* or *other chief executive officer in control of such foreign country or territory shall be returned and surrendered* as hereinafter provided to such authorities for trial under the laws in force *in the place where such offense was committed.* All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern proceedings authorized by this proviso: *Provided further,* That such proceedings shall be had *before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged: And provided further,* That no return or surrender shall be made of any person charged with the commission of an offense of a political nature. If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such person a fair and impartial trial." 31 *Stat.* 656, *c.* 793.

On the 28th day of June 1900 a warrant was issued by Judge Lacombe of the Circuit Court of the United States for the Southern District of New York commanding the arrest of Charles F. W. Neely, who "being then and there a public employee, to wit, Finance Agent of the Department of Posts in the city of Havana, Island of Cuba, on the 6th day of May in the

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year of our Lord one thousand nine hundred, or about that time, having then and there charge of the collection and deposit of moneys of the Department of Posts of the said city of Havana, did unlawfully and feloniously take and embezzle from the public funds of the said island of Cuba the sum of ten thousand dollars and more, being then and there moneys and funds which had come into his charge and under his control in his capacity as such public employee and finance agent, as aforesaid, and by reason of his said office and employment, thereby violating chapter 10, article 401, of the Penal Code of the said Island of Cuba—that is to say, a crime within the meaning of the said act of Congress approved June 6th 1900 as aforesaid, relating to the 'embezzlement or criminal malversation of the public funds committed by public officers, employees, or depositaries.'" The warrant directed the accused to be brought before the judge in order that the evidence of probable cause as to his guilt could be heard and considered, and, if deemed sufficient, that the same might be certified with a copy of all the proceedings to the Secretary of State, that an order might issue for his return and surrender pursuant to the authority of the above act of Congress.

The warrant of arrest was based on a verified written complaint of an Assistant United States Attorney for the Southern District of New York.

On the same day and upon a like complaint a warrant was issued against Neely by the same judge, commanding his arrest for the crime of having unlawfully and fraudulently—while employed in and connected with the business and operations of a branch of the service of the Department of Posts in Havana, Cuba, between July 1st 1899 and May 1st 1900—embezzled and converted to his own use postage stamps, moneys, funds and property belonging to and in the custody of that Department which had come into his custody and under his authority as such employee, to the amount of $57,000, in violation of sections 37 and 55 of the Postal Code of Cuba.

Neely having been arrested under these warrants application was made by the United States for his extradition to Cuba. The accused moved to dismiss the complaints upon various grounds. That motion having been denied the case was heard upon evidence. In disposing of the application for extradition, Judge Lacombe said: "In the opinion of this court, the Government has abundantly shown that there is probable cause to believe that Neely is guilty of the offense of 'embezzlement or criminal malversation of the public funds,' he being at that time a 'public officer' or 'employee' or 'depositary.' Such an offense is obnoxious to the Penal Code in force in Cuba, Article 401 of which provides that 'the public employee who, by reason of his office, has in his charge public funds or property and who should take (or consent that others should take) any part therefrom, shall be punished,' &c. There is no merit in the contention that this article

applies only to persons in the public employ of Spain. Spain having withdrawn from the island, its successor has become the 'public' to which the Code, remaining unrepealed, now refers. The suggestion that under this Penal Code no public employee could be prosecuted or punished until his superior had heard the case and turned the offender over to the criminal law for trial is matter of defense and need not be considered here. The evidence shows probable cause to believe that the prisoner is guilty of an offense defined in the act of June 6th 1900, and which is also a violation of the criminal laws in Cuba, and upon such evidence he will be held for extradition." But, it was further said: "Two obstacles now exist. He [the accused] has been held to bail in this court upon a criminal charge of bringing into this district government funds embezzled in another district. He has also been arrested in a civil action brought in this court to recover $45,000, which, it is alleged, he has converted. When both of these proceedings have been discontinued the order in extradition will be signed. This may be done on August 13th at 11 A. M."

Subsequently, August 9th 1900, Neely presented in the court below his written application for a writ of *habeas corpus* and prayed that he be discharged from restraint in the extradition proceedings. He claimed on various grounds that the act of June 6th 1900 under which he was arrested, detained and imprisoned was in violation of the Constitution of the United States.

The application for the writ of *habeas corpus* having been denied and an appeal having been duly taken, the petitioner was remanded to the custody of the marshal to await the determination of such appeal in this court.

I. That at the date of the act of June 6th 1900 the Island of Cuba was "occupied by" and was "under the control of the United States" and that it is still so occupied and control'ed, cannot be disputed. This court will take judicial notice that such were, at the date named and are now, the relations between this country and Cuba. So that the applicability of the above act to the present case—and this is the first question to be examined—depends upon the inquiry whether, within its meaning, Cuba is to be deemed a *foreign* country or territory.

We do not think this question at all difficult of solution if regard be had to the avowed objects intended to be accomplished by the war with Spain and by the military occupation of that Island. Let us see what were those objects as they are disclosed by official documents and by the public acts of the representatives of the United States.

On the 20th day of April 1898 Congress passed a joint resolution, the preamble of which recited that the abhorrent conditions existing for more than three years in the Island of Cuba, so near our own borders, had shocked the moral sense of the people of the United States, had been

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a disgrace to civilization, culminating in the destruction of a United States battleship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and could not longer be endured. It was, therefore, resolved: "1. That the people of the Island of Cuba are, and of right ought to be, free and independent. 2. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters. 3. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect. 4. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people." 30 *Stat.* 738.

The adoption of this joint resolution was followed by the act of April 25th 1898, by which Congress declared: "1. That war be, and the same is, hereby declared to exist, and that war has existed since the 21st day of April 1898, including said day, between the United States of America and the Kingdom of Spain. 2. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this act into effect." 30 *Stat.* 364, c. 189.

The war lasted but a few months. The success of the American arms was so complete and overwhelming that a Protocol of Agreement between the United States and Spain embodying the terms of a basis for the establishment of peace between the two countries was signed at Washington on the 12th of August 1898. By that agreement it was provided that "Spain will relinquish all claim of sovereignty over and title to Cuba" and that the respective countries would each appoint commissioners to meet at Paris and there proceed to the negotiation and conclusion of a treaty of peace. 30 *Stat.* 1742.

Commissioners possessing full authority from their respective Governments for that purpose having met in Paris, a Treaty of Peace was signed on December 10th 1898, and ratifications having been duly exchanged it was proclaimed April 11th 1899. 30 *Stat.* 1754.

That treaty contained among other provisions the following:

"ART. I. Spain relinquishes all claim of sovereignty over and title to Cuba. And as the island is, upon its evacuation by Spain, to be occu-

pied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property."

"ART. XVI. It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will upon the termination of such occupancy, advise any Government established in the island to assume the same obligations." 30 *Stat.* 1754–1761.

On the 13th of December 1898 an order was issued by the Secretary of War stating that, by direction of the President, a division to be known as the Division of Cuba consisting of the geographical departments and provinces of the Island of Cuba, with headquarters at Havana, was created and placed under the command of Major General John R. Brooke, United States Army, who was required, in addition to his command of the troops in the Division, to "exercise the authority of Military Governor of the Island." And on December 28th 1898, General Brooke, by a formal order, in accordance with the order of the President, assumed command of that Division, and announced that he would exercise the authority of Military Governor of the Island.

On the 1st day of January 1899, at the palace of the Spanish Governor-General in Havana, the sovereignty of Spain was formally relinquished and General Brooke immediately entered upon the full exercise of his duties as Military Governor of Cuba.

Upon assuming the positions of Military Governor and Major General commanding the Division of Cuba, General Brooke issued to the People of Cuba the following proclamation:

"Coming among you as the representative of the President, in furtherance and in continuation of the humane purpose with which my country interfered to put an end to the distressing condition in this island, I deem it proper to say that the object of the present Government is to give protection to the people, security to person and property, to restore confidence, to encourage the people to resume the pursuits of peace, to build up waste plantations, to resume commercial traffic, and to afford full protection in the exercise of all civil and religious rights. To this end, the protection of the United States Government will be directed, and every possible provision made to carry out these objects through the channels of *civil administration, although under military control,* in the interest and for the benefit of all the people of Cuba, and those possessed of rights and property in the island. The civil and criminal code which prevailed prior to the relinquishment of Spanish sovereignty will remain in force, with such modifications and changes as may from time to time be found necessary in the interest of good government. The people of Cuba, without

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regard to previous affiliations, are invited and urged to co-operate in these objects by the exercise of moderation, conciliation, and good-will one toward another, and a hearty accord in our humanitarian purposes will insure kind and beneficent government. The Military Governor of the Island will always be pleased to confer with those who may desire to consult him on matters of public interest."

On the 11th day of January 1899 the Military Governor, "in pursuance of the authority vested in him by the President of the United States, and in order to secure a better organization of the civil service in the Island of Cuba," ordered that thereafter "the civil government shall be administered by four Departments, each under the charge of its appropriate Secretary," to be known, respectively, as the Departments of State and Government, of Finance, of Justice and Publi Instruction, and of Agriculture, Commerce, Industries and Public Works, each under the charge of a Secretary. To these Secretaries "were transferred, by the officers in charge of them, the various bureaus of the Spanish civil government." Subsequently, by order of the Military Governor, a Supreme Court for the island was created, with jurisdiction throughout Cuban territory, composed of a President or Chief Justice, six Associate Justices, one Fiscal, two Assistant Fiscals, one Secretary or Chief Clerk, two Deputy Clerks, and other subordinate employees, with administrative functions, as well as those of a court of justice in civil and criminal matters. By order of a later date, issued by the Military Governor, the jurisdiction of the ordinary courts of criminal jurisdiction was defined.

Under date of July 21st 1899, by direction of the Military Governor, a code known as the Postal Code was promulgated and declared to be the law relating to postal affairs in Cuba. That Code abrogated all laws then existing in Cuba inconsistent with its provisions. It provided that the Director General of Posts of the Island should have the control and management of the Department of Posts and prescribed numerous criminal offenses, affixing the punishments for each. It is not disputed that one of the offenses charged against Neely is included in those defined in the Postal Code established by the Military Governor of Cuba, and that the other is embraced by the Penal Code of that Island which was in force when the war ensued with Spain, and which by order of the Military Governor remained in force, subject to such modifications as might be found necessary in the interest of good government.

On the 13th day of June 1900 the present Military Governor of Cuba, General Leonard Wood, made his requisition upon the President for the extradition of Neely under the act of Congress.

The facts above detailed make it clear that within the meaning of the act of June 6th 1900 Cuba is foreign territory. It cannot be regarded, in any constitutional, legal or international sense, a part of the territory of the United States.

While by the act of April 25th 1898 declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several States to such extent as was necessary, to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States but only for the purpose of compelling the relinquishment by Spain of its authority and government in that Island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the Government, by the joint resolution of April 20th 1898, expressly disclaimed any purpose to exercise sovereignty, jurisdiction or control over Cuba "except for the pacification thereof," and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view and, so far as the court is informed by the public history of the relations of this country with that Island, nothing has been done inconsistent with the declared object of the war with Spain.

Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a Military Governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the Island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

It is true that as between Spain and the United States—indeed, as between the United States and all foreign nations—Cuba, upon the cessation of hostilities with Spain and after the Treaty of Paris was to be treated as if it were conquered territory. But as between the United States and Cuba that Island is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.

In his message to Congress of December 6th 1898 the President said that "as soon as we are in possession of Cuba and have pacified the Island, it will be necessary to give aid and direction to its people to form a government for themselves," and that "until there is complete tranquility in the Island and a stable government inaugurated, military occupation will be continued." Nothing in the Treaty of Paris stands in the way of this declared object, and nothing existed, at the date of the passage of the act of June 6th 1900, indicating any change in the policy of our Government as defined in the joint resolution of April 20th 1898. In

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reference to the declaration in that resolution of the purposes of the United States in relation to Cuba, the President in his annual message of December 5th 1899 said that the pledge contained in it "is of the highest honorable obligation, and must be sacredly kept." Indeed, the Treaty of Paris contemplated only a temporary occupancy and control of Cuba by the United States. While it was taken for granted by the treaty that upon the evacuation by Spain the island would be occupied by the United States, the treaty provided that "so long as such occupation shall last" the United States should "assume and discharge the obligations that may, under international law, result from the fact of its occupation for the protection of life and property." It further provided that any obligations assumed by the United States, under the treaty, with respect to Cuba, were "limited to the time of its occupancy thereof," but that the United States, upon the termination of such occupancy, should "advise any government established in the Island to assume the same obligations."

It cannot be doubted that when the United States enforced the relinquishment by Spain of her sovereignty in Cuba and determined to occupy and control that Island until there was complete tranquility in all its borders and until the people of Cuba had created for themselves a stable government, it succeeded to the authority of the displaced government so far at least that it became its duty under international law and pending the pacification of the Island, to protect in all appropriate legal modes the lives, the liberty and the property of all those who submitted to the authority of the representatives of this country. That duty was recognized in the Treaty of Paris and the act of June 6th 1900, so far as it applied to cases arising in Cuba, was in aid or execution of that treaty and in discharge of the obligations imposed by its provisions upon the United States. The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of Article I of the Constitution, as all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power. What legislation by Congress could be more appropriate for the protection of life and property in Cuba, while occupied and controlled by the United States, than legislation securing the return to that Island, to be tried by its constituted authorities, of those who having committed crimes there fled to this country to escape arrest, trial and punishment? No crime is mentioned in the extradition act of June 6th 1900 that does not have some relation to the safety of life and property. And the provisions of that act requiring the surrender of any public officer, employee or depositary fleeing to the United States

after having committed in a foreign country or territory occupied by or under the control of the United States the crime of "embezzlement or criminal malversation of the public funds" have special application to Cuba in its present relations to this country.

We must not be understood, however, as saying that but for the obligation imposed by the Treaty of Paris upon the United States to protect life and property in Cuba pending its occupancy and control of that island, Congress would have been without power to enact such a statute as that of June 6th 1890, so far as it embraced citizens of the United States or persons found in the United States who had commited crimes in the foreign territory so occupied and controlled by the United States for temporary purposes. That question is not open on this record for examination, and upon it we express no opinion. It is quite sufficient in this case to adjudge, as we now do, that it was competent for Congress, by legislation, to enforce or give efficacy to the provisions of the treaty made by the United States and Spain with respect to the Island of Cuba and its people.

II. It is contended that the act of June 6th 1900 is unconstitutional and void in that it does not secure to the accused, when surrendered to a foreign country for trial in its tribunals, all of the rights, privileges and immunities that are guaranteed by the Constitution to persons charged with the commission in this country of crime against the United States. Allusion is here made to the provisions of the Federal Constitution relating to the writ of *habeas corpus* bills of attainder, *ex post facto* laws, trial by jury for crimes, and generally to the fundamental guarantees of life, liberty and property embodied in that instrument. The answer to this suggestion is that those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.

In connection with the above proposition, we are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States. By the act in question the appellant cannot be extradited except upon the order of a judge of a court of the United States and then only upon evidence establishing probable cause to believe him guilty of the offense charged; and when tried in the country to which he is sent, he is secured by the same act "a fair and impartial trial"—not necessarily a trial according to the mode prescribed by this country for crimes committed against its laws, but a trial according to

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the modes established in the country where the crime was committed, provided such trial be had without discrimination against the accused because of his American citizenship. In the judgment of Congress these provisions were deemed adequate to the ends of justice in cases of persons committing crimes in a foreign country or territory "occupied by or under the control of the United States," and subsequently fleeing to this country. We cannot adjudge that Congress in this matter has abused its discretion, nor decline to enforce obedience to its will as expressed in the act of June 6th 1900.

III. Another contention of the appellant is that as Congress, by the joint resolution of April 20th 1898, declared that "the people of Cuba are, and of right ought to be free and independent" and as peace has existed since, at least, the military forces of Spain evacuated Cuba on or about January 1899, the occupancy and control of that island, under the military authority of the United States is without warrant in the Constitution and an unauthorized interference with the internal affairs of a friendly power; consequently it is argued the appellant should not be extradited for trial in the courts established under the orders issued by the Military Governor of the Island. In support of this proposition it is said that the United States recognized the existence of the Republic of Cuba, and that the war with Spain was carried on jointly by the allied forces of the United States and of that Republic.

Apart from the view that it is not competent for the judiciary to make any declaration upon the question of the length of time during which Cuba may be rightfully occupied and controlled by the United States in order to effect its pacification—it being the function of the political branch of the Government to determine when such occupation and control shall cease, and therefore when the troops of the United States shall be withdrawn from Cuba—the contention that the United States recognized the existence of an established government known as the Republic of Cuba, but is now using its military or executive power to displace or overthrow it, is without merit. The declaration by Congress that the people of Cuba were and of right ought to be free and independent was not intended as a recognition of the existence of an organized government instituted by the people of that Island in hostility to the government maintained by Spain. Nothing more was intended than to express the thought that the Cubans were entitled to enjoy—to use the language of the President in his message of December 5th 1897—that "measure of self control which is the inalienable right of man, protected in their right to reap the benefit of the exhaustless treasure of their country." In the same message the President said: "It is to be seriously considered whether the Cuban insurrection possesses beyond dispute the attributes of statehood, which alone can demand the recognition

of belligerency in its favor. The same requirement must certainly be no less seriously considered when the graver issue of recognizing independence is in question." Again, in his message of April 11th 1898, referring to the suggestion that the independence of the Republic of Cuba should be recognized before this country entered upon war with Spain, he said: "Such recognition is not necessary in order to enable the United States to intervene and pacify the island. To commit this country now to the recognition of any particular government in Cuba might subject us to embarrassing conditions of international obligation toward the organization to be recognized. In case of intervention our conduct would be subject to the approval or disapproval of such government. We should be obliged to submit to its direction and to assume to it the mere relation of a friendly ally." To this may be added the significant fact that the first part of the joint resolution as originally reported from the Senate committee read as follows: "That the people of the Island of Cuba are and of right ought to be free and independent, *and that the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful government of the Island.*" But upon full consideration the views of the President received the sanction of Congress, and the words in italics were stricken out. It thus appears that both the legislative and executive branches of the Government concurred in not recognizing the existence of any such government as the Republic of Cuba. It is true that the co-operation of troops commanded by Cuban officers was accepted by the military authorities of the United States in its efforts to overthrow Spanish authority in Cuba Yet from the beginning to the end of the war the supreme authority in all military operations in Cuba and in Cuban waters against Spain was with the United States, and those operations were not in any sense under the control or direction of the troops commanded by Cuban officers.

We are of opinion, for the reasons stated, that the act of June 6th 1900 is not in violation of the Constitution of the United States, and that this case comes within the provisions of that act. The court below having found that there was probable cause to believe the appellant guilty of the offenses charged, the order for his extradition was proper, and no ground existed for his discharge on *habeas corpus.*

The judgment of the Circuit Court is, therefore,

Affirmed.

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No. 406.

Charles F. W. Neely, Appellant, vs. William Henkel, United States Marshal in and for the Southern District of New York.	Appeal from the Circuit Court of the United States for the Southern District of New York.

[January 14th 1901.]

Mr. Justice HARLAN delivered the opinion of the Court.

The record in this case, it is admitted, shows the same state of facts as in the case just decided. This was a second application for a writ of *habeas corpus*, upon substantially the same grounds as were urged in the other case. The additional allegations in this application for the writ did not materially change the situation.

For the reasons stated in the opinion just delivered, the judgment of the Circuit Court is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.